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# REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1880.

BY

GEORGE F. MOORE,

SPECIAL REPORTER.

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*Errata*.—Page 558, 9th line from bottom, for *detinue* read *ejectment*; page 422, 17th line from bottom, for *purchased* read *foreclosed*; page 422, 4th line from bottom, for *then* read *thus*; page 175, 7th line from bottom, for *representation* read *representative*; page 141, 14th line from bottom, for *conditional* read *original*.



# CASES

IN THE

## SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1880.

### Tyree v. Lyon, Murphy & Co.

*Action on Promissory Note—Plea non est factum.*

1. *Partnership, promissory note of; when onus on plaintiff to show assent of partners to.*—When a promissory note, purporting to have been executed by a partnership, is shown to have been signed by a partner in renewal of a note given for the debt of another firm of which that partner alone was a member, the *onus* is on the plaintiff to show the assent of the other partners to its execution.

2. *Same; assent of partner to, not implied from silence.*—This assent may be express or implied, but the mere silence of the other partners, when informed of the existence of the note, is not of itself evidence that they had assented to its execution.

3. *Charge; when abstract.*—A charge based wholly or partly on a state of facts, of which there is no evidence, is abstract, may mislead the jury, and is properly refused.

4. *Bona fide holder of partnership note, who is not.*—One who knowingly takes the negotiable note of a partnership in payment of the individual debt of one of the partners, is not a *bona fide* holder or purchaser of such paper, and cannot enforce it against the other partners.

5. *Charge, general; when may be given.*—When there is no evidence of a fact which is necessary to sustain the plaintiff's right to recover, the court may, on request, give a general charge on the evidence in favor of the defendant.

APPEAL from the Circuit Court of Mobile County.

Tried before Hon. H. T. TOULMIN.

This was an action on a promissory note signed by Lyon, Murphy & Co., a partnership composed of Lyon, Murphy and H. H. Smith, and payable to appellant Tyree. There was a judgment by default against Lyon, but Smith and Murphy pleaded *non est factum*. On the trial, it was shown that Tyree lent five thousand dollars to the firm of Smith, Lyon & Co., which was composed of Wm. A. Smith and said Lyon, and took their promissory note for the amount. The note was



{Tyree v. Lyon, Murphy & Co.}

twice renewed, and twenty-five hundred dollars was paid on it. Wm. A. Smith died, and Lyon formed a partnership with Murphy and H. H. Smith, under the firm name of Lyon, Smith & Co. The note declared on, was signed by Lyon, in the firm name of Lyon, Smith & Co., and was given in renewal of the note of the former firm of Smith, Lyon & Co. The proof showed that the renewal of the note was made in the office of Lyon, Murphy & Co., who were present, but who were not shown to be aware of the transaction. It further appears, that H. H. Smith drew the check for interest due on the renewal of the note; that there was a pencil memorandum of the note in the bill book kept by Lyon, Smith & Co., but this memorandum was not shown to have been brought to the notice of the other partners; and that Lyon, Smith & Co., were in possession of the stock and assets of Smith, Lyon & Co. There was no agreement by Murphy and Smith, when they formed with Lyon the partnership of Lyon, Smith & Co., that they, as that firm, would assume the debts of Smith, Lyon & Co. The note was renewed in the name of Lyon, Smith & Co., by Lyon without the knowledge or consent of Murphy or Smith.

The plaintiff requested the following charges, which the court refused to give, and the plaintiff excepted:

"If the jury believe from the evidence that the note was made without the knowledge or consent of Murphy, but after it was made he had knowledge of the fact and remained silent after discovering it, that then, this would be evidence of assent prior to, or subsequent to the making of the note, but not conclusive as matter of law.

"3. If they should believe from the evidence that the note was made without the knowledge or consent of Murphy, but after it was made he had knowledge of the fact, and ratified it, or that the partnership of Lyon, Murphy & Co., were benefited by it, that then, he is liable for the amount of the note declared on.

"4. That it was no defense to an action by a *bona fide* holder of a note drawn in the name of the firm, that it was given for the debt of one partner without the consent of the remaining partners, and if you should believe from the evidence that the late firm of Smith, Lyon & Co. were indebted to the plaintiff in the sum of two thousand five hundred dollars, and the plaintiff had the note of said firm for said sum of money, and that the note declared on was made and delivered to plaintiff by Jas. F. Lyon for the same sum of money, and that when the note declared on was delivered to plaintiff, he delivered to said Lyon the note he held, and that the plaintiff had no knowledge at the time that said note

[Tyree v. Lyon, Murphy & Co.]

was made without the consent of Murphy, that then the plaintiff would be a *bona fide* purchaser.

"5. If the jury should believe from the evidence that the late firm of Smith, Lyon & Co. were indebted to plaintiff, and plaintiff held their note for said indebtedness, and that after the firm of Lyon, Murphy & Co. was formed, said note was renewed by giving the note each time of Lyon, Murphy & Co., and that James F. Lyon each time signed the firm name to each of said notes, and plaintiff had no knowledge that the other members of the firm did not authorize or know of it, then the plaintiff has the right to recover.

"6. If you should believe from the evidence that a memorandum of the note declared on, was made upon the book of bills payable, owned and used by the firm of Lyon, Murphy & Co., and it was seen by Murphy, and he made no objection to it, that then he is liable for the amount of said note.

"7. That it is not necessary to entitle the plaintiff to recover, that the proof in his favor should be conclusive; if you believe the evidence establishes, *prima facie*, a good cause of action, it is sufficient."

The court charged the jury, on request, that if they believed the evidence, they must find for the defendant, Murphy. There was a verdict and judgment for the defendants Murphy and Smith, and the errors assigned are, the refusal to give the charges asked by the plaintiff, and giving the general charge at the request of the defendants.

BOYLES, FAITH & CLOUD, for appellant.—A promissory note executed by one of a firm in the firm name is *prima facie* a partnership transaction, and binding on the firm, and the assent of his co-partners to its execution, or their ratification of it may be implied from circumstances, and need not be proved by express agreement.—34 Miss. 352; 2 Ala., 511; 14 Mun. 133; 2. Watts & Serg. 152; 3 Peck. 11; 1 Dev. & B. Eq. 284; 5 Jones, 32; 4 Scam. 378; 18 Tex. 401; 8 Cush. 205; 9 Bush, (Ky.) 417; 39 Iowa, 640; 14 Wend. 133.

2. If after the note was made Murphy knew of the fact and remained silent, and made no objection, this would be evidence of assent prior or subsequent to the making of the note, and his presence at the time of Lyon's signing the note is evidence of his assent.—23 Georgia, 170; 14 Iowa, 157; 1 Sneed R. 254 and 257; 25 Ill. 48; 2 Watts and Serg. 152; 2 Story on Part. 273.

3. If Murphy knew of the pencil memorandum of the note in the bill book of Lyon, Murphy & Co., and made no objection to it, he is bound by it, and the presumption is that

[Tyree v. Lyon, Murphy & Co.]

being a partner he had access to the partnership book and knew the entries therein.—4 Metcalf, 577 ; 24 Ill. 171 ; 5 Mass. 176. An entry made by one partner in the books of the firm during the partnership, will after its termination be evidence against the other partner, if he knew of the entry and had opportunity to examine the books, and did not dissent from it.—23 N. J. Eq. 174.

4. A co-partner may bind his co-partner in his individual transaction, if it is shown that he authorized or ratified it, or that the partnership was benefited by it.—30 La. An. Part II, 1230 ; 37 Mo. 567.

5. If the evidence established *prima facie*, a good cause of action, it is sufficient, and the charge to this effect should have been given.—3 Ala. 536.

J. LITTLE SMITH, and G. L. SMITH, for appellees.—1. The burden of proof was on plaintiff to show that Murphy & Smith had ratified the making of the note, or in some way had become bound on it.—56 Ala. 23 ; 1 Stew. 526 ; 2 Ala. 512 ; 31 Ala. 332 ; 1 Port. 235 ; 15 Ala. 275 ; 30 Barb. 120 ; 57 Pa. St. 531.

2. There was no express ratification ; and implied ratification supposes that the conduct constituting the ratification is only explicable on the hypothesis of a ratification. But mere silence can raise no such hypothesis under the proof in this case.—27 Ala. 612 ; 7 Ala. 377 ; 62 Ala. 186.

3. Murphy would not be liable merely because his firm may have been benefited by the execution of the note.—8 Ala. 17 ; 54 Ala. 494 ; 30 Ala. 110 ; 13 Ala. 837.

4. Tyree was not a *bona fide* holder of the note.—See 2 Ala. 512, and cases *supra*.

5. The 7th charge makes the jury the judges of the law, and is calculated to mislead.

BRICKELL, C. J.—The promissory note on which suit is founded having been given in renewal of a note given for the debt of Smith, Lyon & Co., of which partnership the defendants Smith and Murphy were not members, the burthen of proving their assent to the making of the note by Lyon rested on the plaintiff.—*Mauldin v. Br. Bank of Mobile*, 2 Ala. 503. The assent may have been express, or it may be implied or inferred from circumstances. The mere silence, however, of Murphy, upon being informed of the existence of the note after it was made, was not contractual, had in it no element of estoppel, and of itself was not evidence that he had assented to the making of the note.—2 Whart. Eq. § 1152.

2. Any instruction requested to be given a jury based  
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entirely or partly on a state of facts of which there does not appear to have been evidence, is abstract, has a tendency to mislead, and is properly refused.—1 Brick. Dig. 338, § 41. For this reason, the third instruction requested was properly refused; if it is conceded that it asserted a correct proposition. The bill of exceptions purports to set out all the evidence, and there is a want of any fact tending to show that Murphy ratified the unauthorized act of Lyon in making the note.

3. The fourth and fifth instructions were properly refused. It is quite an error to suppose that one who knowingly takes the negotiable paper of a partnership for the debt of one of the partners, is a *bona fide* purchaser or holder. On the contrary, he is a *particeps doli*, and cannot enforce the paper against the injured partners, whatever rights could be acquired by an innocent indorsee, taking the paper on a valuable consideration before maturity, in the usual course of trade.—*Mauldin v. Br. Bank Mobile*, 2 Ala. 512.

4. The memorandum of the note on the books of the partnership, could not have had any greater effect than to inform Murphy the note had been made, and his mere silence subsequently could not render him liable.—2 Whart. Eq. § 1152.

5. There was no conflict in the evidence—no controversy about the fact that the consideration of the note, was not the debt of the partnership, but the individual debt of Lyon, as the surviving partner of the former firm of Smith, Lyon & Co. It was fully shown that the subsequent firm had not assumed or agreed to assume the debts of the former firm; and there was a total want of evidence tending to show that Smith and Murphy had assented to the making of the note, or with knowledge of the facts had ratified Lyon's unauthorized act in making it. In this state of facts, on request of the defendants, the court could properly give a general charge that the verdict ought to be for the defendants. Such a charge can on request be given when there is no conflict in the evidence.—1 Brick. Dig. 335, § 3. The seventh charge requested by the appellant was properly refused, and the general charge was properly given.

Affirmed.

[Bay Shore Railroad Co. v. Harris, pro ami.]

## Bay Shore Railroad Company v. Harris, pro ami.

*Action on the case to Recover Damages for Personal Injury.*

1. *Trespass or case; when the proper remedy.*—Trespass lies to recover damage for an injury which is the direct and primary, or inevitable result of gross or reckless carelessness; but when the injury, though proximate, is secondary or consequential, and is not the necessary result of the act of negligence, an action on the case is the remedy.

2. *Contributory negligence; infant not guilty of.*—An infant under six years of age, is not of sufficient discretion to be guilty of contributory negligence.

3. *Action on the case for personal injuries; prospective damages in.*—In an action on the case for personal injuries, the recovery is not limited to the actual injury, and the suffering sustained and undergone up to the time of the trial, but the plaintiff may recover prospective damages for the disabling effect of the injury.

4. *Charge, not error; to refuse misleading.*—It is not error to refuse a charge which may mislead the jury, or which requires explanation.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

This action was brought by William Harris, by Drs. Sherrard and Heustis as next friends, against the Bay Shore Railroad Company, to recover damages for a personal injury caused by the alleged negligence of the defendant. The complaint contained only one count, which averred, in substance, that defendant owned and operated a "horse railroad in the city of Mobile; that on the 12th day of March, 1876, while one of the cars on defendant's said road was being driven along slowly, the driver called plaintiff, who was standing on the sidewalk, to get on the cars, which plaintiff did, as requested; that he remained on the car until it returned to or near the place where he got on, and then and there, while said car was running at a rapid rate or speed, said driver ordered the plaintiff to jump off said car, which he did as ordered, and plaintiff fell, and then and there the wheels of said car ran over and crushed one of plaintiff's legs, which was thereby fractured and broken, and plaintiff was otherwise greatly injured and wounded, so much that plaintiff had to have said leg cut off to save his life; that plaintiff was sick, sore and diseased for a long space of time, during all of which time he suffered great bodily pain, and became, and is disabled for life. And plaintiff avers that during the time aforesaid, he became largely indebted to Drs. Sherrard and Heus-

[Bay Shore Railroad Co. v. Harris, pro ami.]

tis for care and medical attention." Defendants demurred to the complaint, on the ground that the action is based on the wilful act of the defendant's servant, and they are therefore not liable, as alleged in the complaint. The court sustained this demurrer, and plaintiff amended his complaint by inserting after the words "the plaintiff, an infant," the words "under six years of age," and by inserting before the words "ordered the plaintiff to jump off," &c., the words, "recklessly and carelessly." Defendant demurred to the amended complaint on the ground that the original complaint "was in form of an action of force," and the amendment is "in form of negligence," and changed the nature of the action. The court overruled this demurrer, and defendant excepted.

The plaintiff was a child under six years of age, and the evidence adduced by him showed that on Sunday evening, March 12, 1876, his mother had gone to church and left him in charge of his brother, who was about fourteen years old. These two boys, and several others, were standing on the sidewalk near their father's house when a car of the defendants came slowly along the road going towards a turn-table which was at the end of the track, some two hundred yards off, and the driver stopped the car and called the boys to come to it; that the driver asked them to lend him a knife, and told them to get on the car. While in the act of getting on the car, plaintiff's father called to them not to get on the car. They did so, however, without having heard him, and the driver used the plaintiff's knife in cutting some straps for his whip. No one else was on the car except the plaintiff and his brother. They went to the turn-table, and on their return near the place where they got on, and while the horses, which were drawing the car were in a "fast trot," the driver ordered the plaintiff to jump off. Plaintiff was at that time on the front platform of the car with the driver, his brother being inside of the car. In attempting to jump off the car, plaintiff fell, and the car wheel passed over and broke his leg, which was amputated because the physicians thought it necessary to do so to save his life.

The driver of the car testified that plaintiff would sometimes jump on the car without his consent, and against his objection and jump off again, and if plaintiff and his brother were on the car at the time the accident occurred, he did not know it.

The court, among other things, charged the jury that "if you find that the plaintiff was injured by the negligence of the defendant's car driver, and you believe the plaintiff was under six years of age at the time, then contributory negligence can not be set up to defeat his right to recover," and



[Bay Shore Railroad Co. v. Harris, pro ami.]

that the damages are not to be restricted to any special pecuniary loss, but would include present and prospective damages, considering plaintiff's age when injured, his circumstances and position in life, the expenses incurred in nursing and caring for him, and medical attention." The defendant excepted to these charges, and requested several charges, only three of which are necessary to be here set out. "2. That defendants, as owners of the railroad company, were not liable for the injury if it was caused wilfully by the acts of their agents or servants. 3. The plaintiff can not recover on this complaint on the facts as they are adduced by the plaintiff. 7. That if the injury was occasioned by the carelessness and negligence of the defendant's servant, in the proper discharge of the servant's duty, then the plaintiff can recover only the actual damages shown by the evidence before the jury to have been incurred." The court refused to give these charges, and defendant excepted. There was a verdict and judgment for the plaintiff for \$3,000. The action of the court in overruling the demurrer, and refusing the charges, is assigned as error.

ALEX. MCKINSTRY, for appellant. (No brief has come into the hands of the Reporter.)

WM. BOYLES, for appellee, cited *Govt. Street R. R. v. Hanlon*, 53 Ala. 70; *Hilton v. Middlesex R. R.* 107 Mass. 108; *Lovett v. South Danvers R. R. Co.* 9 Allen, 557.

STONE J.—When injury is the direct and primary, or inevitable result of gross or reckless carelessness, an action of trespass will lie. But, when the injury, though proximate, is secondary or consequential—not the necessary result of the act of negligence—then, a special action on the case is the remedy.—*Sheppard v. Furniss*, 19 Ala. 760; *Rhodes v. Roberts*, 1 Stew. 145. The injury charged in the present complaint—in the original as well as the amended count—is secondary and consequential; not the direct, primary, immediate effect of the wrongful or reckless act imputed to the driver. The direct, primary effect was the leap from the car. The consequence was, that the child, by reason of its tender years, being unable to clear the track, was run over and its limb crushed by the wheels. If the driver had thrust or thrown the child on the track, and he was thus run over, all this would have been the direct result of the force employed, and trespass would have been the appropriate remedy.

The plaintiff in this case being under six years of age, was not of sufficient discretion to be guilty of contributory negli-

[Craft v. Russell.]

gence.—*Govt. Street R. R. Co. v. Hanlon*, 53 Ala. 70. The pleadings make a clear case for recovery.—*Phila. & R. R. Co. v. Derby*, 14 How. U. S. 468; *Levett v. Railroad Co.* 9 Allen, 557; *Wilton v. R. R. Co.* 107 Mass. 108; *S. C.* 9 Amer. Rep. 11.

Charge numbered 7, asked by defendant, probably asserts a correct legal principle. We think, however, that an average jury would be misled by it into the erroneous conclusion that plaintiff could recover only for the actual injury and suffering he had sustained and undergone at the time of the trial. That is not the rule. He was entitled to recover for the disabling effects of the injury, prospective as well as past. *S. & N. Railroad Co. v. McLendon*, 63 Ala. 266. It is not error to refuse a charge which may mislead, or requires explanation.—*Bynum v. So. Pipe & Pump Co.* 63 Ala. 462; *Duvall & Pelham v. The State*, *Id.* 12; *Farrish v. The State*, *Id.* 164, and authorities there cited.

Affirmed.

## Craft v. Russell.

### *Bill in Equity to Enforce Vendor's lien on lands.*

1. *Vendor has lien on lands.*—In the absence of an agreement, express or implied, to the contrary, the vendor of lands has a lien on them for the unpaid purchase-money which will prevail against a sub-purchaser with notice.

2. *Bona fide purchaser; what necessary to sustain defense as.*—When a defendant sets up the defense of a bona fide purchaser for value without notice in answer to a bill, to enforce a vendor's lien on land, he must aver clearly, distinctly and without equivocation.—1. That he is the purchaser of the legal title. 2. That he purchased in good faith. 3. That he parted with value by paying money or other valuable thing, assuming a liability, or incurring an injury. 4. That he had no notice of complainant's equity, and knew no fact calculated to put him on enquiry, either at the time of his purchase, or at or before the time he parted with the consideration.

3. *Mortgage; when he is a purchaser for a valuable consideration.*—When a mortgage is taken as security for a pre-existing debt, the mortgagee is not a purchaser for a valuable consideration, but the rule is different when the mortgage is taken for a debt contemporaneously created, or when the day of payment is extended.

4. *Creditor taking conveyance, purchaser for value.*—When a creditor takes an absolute conveyance in payment of an antecedent debt he is a purchaser for value.

5. *Purchaser protected as to payments made before notice.*—A purchaser of lands is entitled to protection *pro tanto* to the extent of payments made by him before notice of the vendor's equity.

6. *Answer; how far taken as evidence.*—An answer can only be taken as evidence so far as it is responsive to the allegations and interrogatories in the bill,

[Craft v. Russell.]

and when its denials are clear, positive and distinct, and matters of defense, though in form responsive, cannot be taken as evidence.

7. *Parties, objection for want of; when may be disregarded.*—A demurrer for want of proper parties may be disregarded when the answer shows that all the parties really interested are before the court.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill filed by Russell and wife, against John Craft and Hugh Elliott, and sought to enforce a vendor's lien on a lot of land in the city of Mobile. The bill describes the lot, and states that it was a part of the statutory separate estate of Mrs. Russell; that on the 16th of October, 1875, complainants executed and delivered to one Hugh Elliott a deed to said land for the consideration of three hundred and fifty dollars, that being the amount of the purchase-money agreed to be paid therefor by said Elliott; that said Elliott executed his promissory note for the purchase-money of said lot, but that no part of it had ever been paid, and that it was still due to complainants; that said note was made at the time when the deed was executed to Elliott, and was payable four months after date. The bill further shows that on Aug. 1st, 1877, said Hugh Elliott made and delivered a deed to said lot, to one John Craft; that the consideration alleged in said deed was the sum of \$125, but that said Craft did not pay to said Elliott said sum, or any part thereof, at the time of the execution and delivery of the deed, nor at any time before said Craft acquired knowledge of the lien held by the complainants on the land for the unpaid purchase-money; that the true and real consideration of said deed was to secure an indebtedness due by said Elliott to the firm of Tousmiere & Craft, of which defendant Craft was a member, and that no money was paid by Craft to Elliott for the land. The bill averred that Craft knew when he received the deed from Elliott, that the latter had not paid the purchase-money of the land, which was due to complainants, and prayed that they might be decreed to have a lien thereon, and that it be sold to pay the purchase-money. Defendant Craft demurred to the bill on the ground that while it averred that defendant held the title to the land, to secure an old indebtedness, due to Tousmiere & Craft, said Tousmiere was not made a party to the bill. This demurrer was incorporated in a sworn answer, which states that early in 1877, the defendant Craft became the owner by transfer from Tousmiere, of the firm of Tousmiere & Graham, of a debt due by open account from Hugh Elliott to said firm for the sum of sixty-five dollars; that he put this claim in the hands of a justice of the peace for collection, who brought suit on it; thereupon Elli-



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ott offered to sell him the lot of land in controversy, in settlement of this debt, for the sum of \$125. It was agreed between them that the debt due by Elliott to Tousmiere & Craft should be a part of the consideration paid for the land, as well as the costs of the suit in the justice's court, the cost of making and acknowledging the deed, certain unpaid back taxes and the cost of investigating the title to the lot; that he caused Elliott's title to be investigated by an attorney, who reported it to be good, and that he thereupon receipted Elliott's debt to him, paid the back taxes, and the cost of investigating the title, and of making and acknowledging the conveyance, and received from Elliott a deed conveying the lot to him in fee simple; that he bought the lot in good faith, and did not take the title as a mere security; that there was nothing on the records of the probate court of Mobile county to charge him with notice of complainant's lien, and that he had no notice or knowledge that complainant claimed any lien until several months after he had purchased the land; that J. H. Russell told him in August, 1877, about complainant's claim; that he owed Elliott about \$25 when he first heard of complainant's claim, and this sum he had withheld from Elliott. In answer to an amended bill, defendant stated that he had not yet paid the back taxes due on the lot before he bought it. The chancellor overruled the demurrer, decreed a lien in favor of complainant, and ordered the property sold to pay the purchase-money. This decree is assigned as error.

HERNDON, CROOM & LEWIS, for appellant.—Appellant was a purchaser without notice of a mere vendor's lien, and not of an outstanding title; and equity in such cases will not decree that the land be sold, but only that it be subjected to the payment of the balance of the unpaid purchase-money, towards the satisfaction of the vendor's lien.—*Frost v. Beekman*, 1 Jh. Ch. R. 300; 7 Wh. 46; *Houston v. Stanton*, 11 Ala. 413; *Dixon v. Brown*, 53 Ala. 428. See, also, *Bankhead v. Owen*, 60 Ala. 465. In such a case as this the effect is to render him liable to account to the creditor, attacking the conveyance for any unpaid balance of the purchase-money.—*Florence v. Zeigler*, 58 Ala. 224. Appellant has the superior legal title, and the equities of the parties are at least equal, and hence the legal title must prevail.—2 Story's *q. Jur.* § 1603, 415. The firm of Tousmiere & Craft should have been made a party defendant.—Story's *Eq. Pl.* 207; 7 Ala. 369; *Prout v. Hoge*, 57 Ala. 30.

BOYLES, FAITH & CLOUD, for appellee.—Appellant was not a *bona fide* purchaser.—19 Ala. 50; 31 Ala. 175. The consider-

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ation of his purchase was an antecedent debt due to the firm of Tousmiere & Craft by Elliott.

SOMERVILLE, J.—The decisions of this court have been uniform in holding, that the vendor of lands, in the absence of an agreement, express or implied, to the contrary, retains a lien on the lands sold and conveyed for the unpaid purchase-money, which shall prevail against any sub-vendee who purchases with notice of the original vendor's equity.—*Foster v. Atheneum*, 3 Ala. 302; *Buford v. McCormick*, 57 Ala. 428. And when a bill is filed to enforce such lien, a plea put in by a defendant claiming to be a *bona fide* purchaser for value without notice, in order to be available as a protection against a prior equity or conveyance asserted by the complainant, must aver clearly, distinctly and without equivocation the following facts: (1) that he is the purchaser of the legal as distinguished from an equitable title; (2) that he purchased the same in good faith; (3) that he parted with value as a consideration therefor by paying money or other thing of value, assuming a liability or incurring an injury; (4) that he had no notice, and knew no fact sufficient to put him on inquiry as to complainant's equity, either at the time of his purchase, or at, or before the time he paid the purchase-money, or otherwise parted with such value.—*Moore v. Clay*, 7 Ala. 742; *Johnson v. Toulmin*, 18 Ala. 50; *Ledbetter v. Walker*, 31 Ala. 175; 2 *Smith's Leading Cases*, (White and Tudor) 73, 74; *Ware v. Curry*, 67 Ala.; *Thames v. Rembert's Adm'r*, 63 Ala. 561; *Buford v. McCormick*, 57 Ala. 428; *Saffold v. Wade's Ex'r*, 51 Ala. 214; *Hallet v. Collins*, 10 How. (U. S.) 174; *Nantz v. McPherson*, (7 T. B. Monroe, 597); 18 Amer. Dec. 216; *Jackson v. McChesney*, (7 Cow. 360) 17 Amer. Dec. 520; *Gilpin v. Davis*, (2 Bibb, 416), 5 Amer. Dec. 622.

And while a mere mortgage or deed of trust taken as security for a pre-existing debt does not constitute the mortgagee a *bona fide* purchaser for value, yet the rule is different where the creditor takes a mortgage for a debt contemporaneously contracted, or extends the day of payment of an antecedent debt, or accepts an absolute conveyance in payment of such antecedent debt, for in the latter case the debt is extinguished and the relation of the parties is entirely changed.—*Wells v. Morrow*, 38 Ala. 125; *Saffold v. Wade's Ex'r*, *supra*; *Thames v. Rembert's Adm'r*, *supra*; Code (1876) §§ 2166-7. As to a partial payment made by the purchaser before notice, he is protected as having acquired an equity, *pro tanto*—*Sewing Machine Co. v. Zeigler*, 53 Ala. 222.

The answer of a defendant can be taken as evidence only so far as it is responsive to the allegations and interrogatories of

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the bill, but the denials of the answer must be positive, clear and distinct, and not evasive, uncertain or illusory. Mere matters of defense, which are averred in the answer, though in form responsive, cannot be taken as evidence, unless sustained by proper proof in the ordinary way.—*Adam's Eq.* 363, (note); *Dunn v. Dunn*, 8 Ala. 784; *Walker v. Miller*, 11 Ala. 1067; *Wakeman v. Grover*, 4 Paige, 23.

The statements of Craft's answer, made to the bill in this case are not, we think, sufficiently distinct and unequivocal, when tested by the foregoing cardinal principles. His allegations, furthermore, as to Elliott's agreement to allow, as a credit on the purchase-money of the land, the cost of the conveyance, back taxes and other items specified, present matters of defense not responsive to the bill, and should have been proved otherwise than by Craft's sworn answer. The evidence, therefore, fails to sustain these items, and they were properly disallowed.

The appellant further assigns as error, the overruling of his demurrer, which was based upon the suggestion that Tousmiere should have been made a party to complainant's bill. The rule of practice established in this court is, that where such a demurrer is interposed for want of proper parties defendant, and the answer shows that all interested parties are really, and in fact before the court, there is no good reason why complainant should be compelled to amend his bill, or that it should be dismissed; the objection may be properly disregarded, and there is no error in proceeding to a final decree.—*Chapman v. Hamilton*, 19 Ala. 121, 125.

The decree of the Chancellor is affirmed.

## Smoot v. The Mobile & Montgomery Railway Company.

*Action by Employee against Railway Company for Damages for Personal injury.*

1. *General charge on the evidence, when proper.*—A general charge on the evidence is proper, and should be given on request, whenever the court would sustain a demurrer to the evidence, if interposed by the party requesting the charge; but when the evidence is conflicting, or circumstantial, or when a material fact rests wholly in inference, such a charge cannot be sustained.

2. *Master; when responsible to servant for personal injuries.*—For injuries proceeding from the personal fault, or negligence of the master, he is under the same liability to his servant as to third persons, towards whom he sustains no special relation; but he is not liable for injuries caused by the negligence, or



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fault of other servants in the same employment, which are the risks incident to the common employment, and which each servant is presumed to contemplate when he enters the service.

3. *Name; what care he must use in furnishing materials to servant.*—The master is bound to use ordinary care—such care as men of ordinary prudence exercise under like circumstances for their own protection, in the selection of careful and skillful servants, and in furnishing fit and safe materials, and appliances or machinery necessary and proper for the service, and for injuries arising from a breach of this duty in either particular, he is liable to a servant, but he is not to be understood as insuring, or warranting the safety, or fitness of the materials furnished, nor the diligence and competency of the other servants in the performance of their respective duties.

4. *Employee; when may recover damages sustained by reason of defective materials, &c.*—While a passenger may recover damages from a railroad company on a presumption of negligence, whenever injuries are received because of unfit instrumentalities employed in his transportation, a servant or employee of the company can not recover without proof of negligence, either in the selection of instrumentalities originally defective and unsafe, or in the use of unsafe instrumentalities after knowledge of their defective condition; and such knowledge on the part of a fellow servant is not sufficient to charge the company with notice of the defect.

5. *Cars and locomotives, duty of railroad companies as to inspecting.*—It is the duty of a railroad company to exercise ordinary care for the inspection of its locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required.

## APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

This was an action brought by the appellee against the appellant, to recover damages for personal injuries sustained by him while acting as “brakesman,” on the appellant’s road. On the trial it appeared that on the 14th of October, 1876, plaintiff was employed as a “brakesman” on a train of freight cars going to Mobile, from Montgomery, over the defendant’s railroad. When the train reached Greenville, seven loaded cars were attached to the train, from a number of cars which were standing there to be carried over the road. There was no car inspector at Greenville, but there was one at Pensacola Junction, a station which the train passed on the trip to Mobile. When the train reached Bay Minette, plaintiff undertook, being ordered to do so by the conductor of his train, to couple on more cars to those taken on at Greenville. In doing so he saw that the bumper on a car taken on at Greenville, and which he was attempting to couple on to a car to be taken on to Bay Minette, hung down lower than it should do, and putting his hand under it to raise it up, so as to make it meet the other bumper, the bumper which he was handling was driven in, and his hand was caught and folded through the iron strap which supported the bumper, and was severely crushed, his body was bruised so badly that the injury produced hernia; his hand was completely disabled; he was confined to his bed for a long time. The iron strap

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which supported the bumper was worn and broken, and there was no bolt in the bumper which would move backward, but would not spring forward. Plaintiff, however, testified that he did not know this until after he was hurt, the break in the bumper being under it where he could not see it without getting down and looking up. Walker, another "brakesman" on the same train, testified that when he saw appellee going to couple this car, he called out to him "look out," telling him that the bumper was broken. Plaintiff testified that he did not hear Walker call out to him. The same witness testified that he coupled up the same car at Greenville and knew that the bumper was broken, for that was the only thing which could make it hang down as it did. He also testified that it was the duty of the station agent at Greenville, to examine the cars at Greenville before loading them, and not to load a car which was in bad order; that it was his duty as "brakesman" to tell the conductor that the car was in bad order, but he did not do so; that it was also his duty to inform any other "brakesman," who was about to couple this car, that it was dangerous to do so, and that he did call out to plaintiff; and it was the duty of the car inspector to have the cars which were in bad order, taken from the train, and sent to the shops for repairs. The plaintiff asked the court to charge the jury, that "if the jury believe from the evidence, that although the employees of the company were negligent, and that Smoot did not contribute thereto, yet if the company did not exercise due care and diligence to know the condition of the car, the plaintiff would be entitled to recover." This charge the court gave, and the defendant excepted. The defendant asked the court to charge the jury, that "if they believed the evidence, they must find for the defendant." This charge the court refused to give, and the defendant excepted. There was a verdict for the plaintiff for \$10,000. The ruling of the court in giving and refusing the charges set out above are assigned as error.

G. L. SMITH, for appellant.—An employee can not recover for an injury occurring by the negligence of his co-employee. *M. & M. R'way Co. v. Smith*, 59 Ala. 245; *Scott v. Parham*, 24 Ala. 36. Walker, the co-employee of appellant, knew that the bumper was broken, and he testified that it was his duty to tell the conductor of the train of this fact, but he did not do so; if he had done so there would have been no injury inflicted on appellant at Bay Minette. If the station agent at Greenville had discharged the duty imposed, *i. e.* not to load cars that were in bad order, the appellant would not have been injured. If the car inspector at Pensacola Junc-

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tion had performed his duty, no accident would have happened. It thus appears that the company exercised great care to protect its employees from injury by reason of defective cars. In addition to this, it was the duty of appellant to have examined the coupling himself, and failing to do so, his own negligence contributed directly to produce the injury.

JOHN A. CUTHBERT, and J. W. A. SANFORD, for appellee.—There should have been a car inspector at Greenville; the station agent there was not shown to have been skilled in the construction of cars, or competent for the duty of examining them—the presumption indeed being to the contrary. It was the duty of the railroad company to procure suitable instrumentalities for conducting its business, and keep them in good condition. A failure to do this is negligence, and if an injury result to an employee therefrom, the company is liable in damages.—*Patterson v. Pitts & C. R. R. Co.*, 76 Pa. St. 389; *Chicago & N. W. R. R. Co. v. Taylor*, 18 Am. R. 626. The injury to appellant was caused by the defective bumper, the condition of which could have been ascertained by the use of ordinary diligence. While this car was being used for the transportation of freight, the appellant was injured, and for this injury the railroad company is liable in damages. *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Lalor v. Chicago, Burlington & Quincy R. R. Co.* 4 Am. R. 616; *Gibson v. Pacific R. R. Co.* 46 Mo. 163; *Heegan v. Western R. R. Co.* 4 Selden, 115; *Snow v. Housatonic R. R. Co.* 8 Allen, 444.

BRICKELL, C. J.—The instruction to the jury, given at the request of the appellee, to which an exception was reserved, is loosely worded, and confused. Interpreting it as we suppose it was intended the jury should interpret it, we understand it as affirming that, though the injuries of which the appellee complains were the result of the negligence of his fellow-servants, yet the appellant is liable in damages for such injuries, if it did not exercise due care and diligence to know the condition of the car, from the defects, or rather the impaired condition of which the injuries proceeded. We do not propose to consider this instruction particularly, because we reach the conclusion, that the City Court erred in refusing, on the request of the appellant, to instruct the jury that, under the evidence, the appellee was not entitled to recover. Such an instruction cannot be supported, when the evidence is conflicting, or when the evidence is circumstantial, or when a material fact rests wholly in inference. It may be given, and should on request be given, whenever the court would



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sustain a demurrer to the evidence, interposed by the party requesting the instruction.—1 Brick. Dig. 335, §§ 1-4.

The legal propositions the case involves, are not matter of doubt, or uncertainty, but are well defined and well settled by a long line of decisions, and have been often in this court the subject of consideration. A master is under the same liability to his servant, for injuries proceeding from his negligence, that he is to third persons to whom he sustains no special relation. So, a liability rests upon him, whenever his personal fault contributes directly to cause the injury, though concurring with it, there may have been the negligence of a servant engaged in the same common employment. In *Roberts v. Smith*, 2 Hurls. & Nor. 212, a scaffolding was erected under the immediate supervision of the master, who would not permit the use of some safe and strong scantlings, directing the use of others, weak and not safe, in consequence of which the scaffolding fell, and a servant was injured; the master, because of his presence, personal interference, and negligence, was held liable. So, in the case of *Noyes v. Smith*, 28 Vt. 59, the personal fault of the master was in the careless selection of a locomotive, which was unsafe and dangerous, from the explosion of which the engineer, to whom its unfitness was unknown, was injured; the want of proper care and diligence rendered the master liable to the engineer. It is, however, the *negligence of the master*, for which liability to a servant can be visited upon him, for the rule is settled, that he cannot be made liable for injuries proceeding from other servants in the same employment. Injuries, resulting from such cause, are of the risks incident to the employment, which it is intended the servant contemplates, and consents to incur, when he enters the service. There is also, a higher reason for relieving the master from liability for such injuries, founded in the policy of encouraging and compelling the servant to exercise diligence and caution in the discharge of his duties, which, while protecting him, affords protection also to the master; such diligence being properly esteemed a better security against injury from the negligence of a fellow-servant, than recourse against the master for damages, when the injury has been received.—Cooley on Torts, 541.

It is, however, a duty resting upon the master, to use ordinary care—the care which men of common or ordinary prudence exercise under like circumstances for their own protection—in the employment of careful and skillful servants, and not to continue in his service such as are known to be wanting in either reasonable skill or diligence. This duty is not now involved, for it is not insisted that there was any want of prudence in the employment of any of the fellow-servants of

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the appellee, or any want of skill or care on their part. Another duty of the same kind, which it is supposed the appellant did not observe (and upon that supposition the present action has been prosecuted), is the use of ordinary care or diligence in furnishing safe and fit materials, appliances, and, when that is employed, machinery, for the service in which the servant is engaged. This, however, is not an *absolute duty*. The master must not be understood as *insuring*, or *warranting*, the safety or fitness of the materials or appliances furnished, more than he can be regarded as promising, absolutely and unconditionally, that the fellow-servants are competent and diligent. The duty resting upon him is to exercise *due care and diligence*, as we have defined it—the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection, and the protection of his property. When this is exercised, the duty to the servant is satisfied; for there is no obligation resting upon the master, to be more careful for the safety of the servant, than for his own security.—*Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, 719. Accidents, from which personal injury may result, proceeding from defects originally existing in such appliances, or which result from their use, are, like the negligence of fellow-servants, of the incidental hazards of the service, to which the servant must have contemplated he would be exposed.—*Mobile & Ohio R. R. Co. v. Thomas*, *supra*; *Searle v. Lindsay*, 11 Com. Bench (N. S.), 429; *Wonder v. Balt. & Ohio R. R. Co.*, 32 Md. 411; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; *Hurd v. Vermont & Canada R. R. Co.*, 32 Vt. 473. When such appliances have been furnished—when diligence has been observed in procuring them, the use of them is necessarily intrusted to the servants of a railroad company, as is their care and inspection, and the repair of them, and determining when the use must be abandoned, until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty than that of inspection or of repair. However this may be, the several servants are in the same circle of employment—derive duty and compensation from the same source, and are laboring for a common purpose. They are fellow-servants, and the master cannot be made answerable to the one, for the negligence of the other. The machinist in the shop, whose duty it was to repair locomotives, and the supervisor of track, whose duty it was to keep the road bed in proper and safe condition, have each been determined fellow-servants of the fireman on the locomotive, for whose negligence the master could not be made liable.—*Mobile &*

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*Ohio R. R. Co. v. Thomas, supra; Mobile & Montgomery R. Co. v. Smith, 59 Ala. 245.*

If, therefore, the coupling or bumper of the car, causing the injuries of which the appellee complains, or the use of the car in its defective condition, was the result of the neglect or want of care of a fellow-servant—of the station agent at Greenville—the conductor of the train, the fellow-brakeman or the car inspector at Pollard Junction, each and all of whom being engaged in the same common service, and the same general business, the appellant cannot be made liable, unless negligence can be imputed to it, concurring with their negligence. The burthen of proving such negligence rests upon the appellee. It is the indispensable element of his right of recovery—the very *gravamen* of his complaint. Inferences of it cannot be drawn from the fact of injury, and from the unfit and unsafe condition of the car. This is the established doctrine, distinguishing the case of a servant, claiming damages for injuries resulting from negligence, and passengers, who can recover upon a presumption of negligence, whenever injuries are received because of unfit instrumentalities employed in their transportation.—*Mobile & Ohio R. Co. v. Thomas, supra.*

In this case, there is a want of evidence that the car was originally unsafe. The unfitness and danger imputed to it, was the result of breaking of parts of it, in the use. When it became broken, and, in consequence, unsafe and unfit for use, or how long it had been in that condition, is not shown. But that it was accidentally in this condition, on the road, between its terminating points, in use for transporting freight at a time and place, when and where, the appellant could not be reasonably expected to have knowledge of its condition, is apparent. True, the witness Walker speaks of it as *not safe*, and the caution he observed in the use of cars having a coupling of the like kind. But, it is apparent he was speaking of it, only as compared with other cars, having a coupling of different construction, and as less safe than such cars; not as unfit or unsafe for use absolutely. The master is not bound to supply the servant with the most approved and the safest appliances. Such as are safe and fit, not exposing the servant to greater perils than are usually incident to the service, is the measure of duty.—Whart. Neg. § 213; *Mobile & Ohio R. R. Co. v. Thomas, supra.*

The negligence of the appellant is supposed to consist in a want of ordinary care to know the condition of the car. Knowledge of its condition is not imputed, but ignorance is alleged to have been culpable, because the result of negligence. Turning to the case in that view, we repeat, the bur-



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then of proof rests upon the appellee. We look in vain for the slightest evidence that any of its officers or agents, for whose negligence the appellant would be responsible, until after the accident by which the appellee was injured, had knowledge of the defective condition of the car, or of any fact which ought to have put them on inquiry. Knowledge of the defective condition of the car, a want of prudence in its use, is traceable only to *fellow-servants* of the appellee, whose care and diligence he is presumed to have consented to risk; whatever of guards against the use of defective cars were reasonable, so far as the evidence shows, and to which it could justly be expected the appellant would resort, were adopted. The station agent at Greenville was in duty bound not to load, or suffer loaded, unfit cars. The car inspector at Pollard Junction was bound not to permit unfit cars to pass his station. The brakemen were under the duty of examining the car-wheels and couplings and reporting to the conductor whenever either was found unsafe, or in any respect unfit. Engaged in running a long line of railroad, while it was the duty of the appellant to exercise ordinary care for the inspection of its cars, and for the prevention of the use of such as were unsafe, or in any respect unfit, a system of inspection which would embarrass its operations cannot be required. It would, it may be, have been a higher degree of care, to have caused an inspection of cars at every station, and thereby greater security against accidents would have been afforded. That would be a degree of care, a servant has no right to expect or demand.

When the master provides machinery in itself safe, or exercises ordinary care in providing it, and exercises the same care to keep it in that condition, if he were held to answer for the negligence of the servants whose duty it is to use it, to inspect it, and to use it only when safe, and to give him notice when it becomes unsafe, the rule relieving him from liability for servants upon whose fidelity he is compelled to rely, would be practically abrogated.

The essential fault—the negligence of the appellant, for which alone there is liability to the appellee—was not shown; nor was there evidence tending to show it. The injuries received by him were accidental, the incidents of the service in which he engaged voluntarily; or, if mixed with negligence on the part of others, it was the negligence of his fellow-servants. The City Court erred in refusing to charge that the evidence did not authorize him to recover.

But, independent of this view, the evidence is undisputed, that it was part of the duty of the appellee to look after the coupling of the car; and that, if with proper care he had

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performed the duty, he would have known the defective condition of this coupling. Having knowledge of its condition, and exercising the care and prudence which was necessary in using the coupling in its condition, he could have avoided injury from it, as did his fellow-servant, Walker. His failure to examine the coupling, or, if he examined, his failure to employ the care and diligence in its use required by its condition, contributed to produce the injury of which he complains. The principle, that a person who, by his own negligence, exposes himself to injury, cannot recover damages for the injury, applies to the relation of master and servant; and the servant cannot recover of the master, for injuries to which his own negligence directly contributed.—Cooley on Torts, 563; Whart. Neg. § 244; *M. & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541; *V. & M. R. R. Co. v. Wilkins*, 47 Miss. 404.

Without considering other questions, the judgment is reversed, and the cause remanded.

## Finnegan v. Frank.

### *Action on Charter Party.*

1. *Charter party—stipulations in, not inconsistent.*—When a charter party stipulates that the “party of the second part assumes all liability for all ordinary wear and tear of said steamer,” and by a subsequent clause, “agrees to return at the expiration of the charter the steamboat in the same condition as when received, ordinary wear and tear excepted,” there is no inconsistency in the two stipulations, the latter providing for injuries outside of ordinary wear and tear, for which the former provides.

2. *Same; when charterer becomes quasi owner under.*—When the charterer has absolute control of the vessel, its voyages, manning and direction, during the continuance of the charter, he becomes the *quasi* owner of the vessel, is entitled to all the benefits of ownership, and subject to all its liabilities, including those incurred for necessary repairs.

3. *Sicorn plea; when necessary.*—In an action for work and labor done at the instance of the defendant, if the complaint alleges that the claim is now due and is the property of the plaintiff, and the defendant does not by a sworn plea deny the plaintiff's ownership, no question as to it can be raised in this court.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

Black, who was the owner of the steamboat “Peerless,” chartered her to Finnegan. The material clauses of the charter party are quoted in the opinion. During the continuance of the charter, on a trip up the Alabama river, the boat encountered a violent storm of wind and rain which, despite

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the efforts of her officers and crew, drove her ashore so that she struck a rock near, or the wharf at, Bell's Landing, and was thereby damaged. By order of defendant Finnegan she was hauled out on the ways and repaired. The work was done by Seawell, who claimed a lien on the boat for the cost of the repairs, which amounted to two hundred and ninety-five dollars. In order to procure the release of the steamer, Black gave Seawell the two hundred and ninety-five dollars, and took the latter's due-bill therefor, with an agreement that if a recovery was had against Finnegan, the money recovered was to be paid to Seawell, and the money given him was to be returned; but if no recovery was had against Finnegan, Seawell was to retain the money given him by Black, and the due-bill returned to Black, or destroyed. The bill for the repairs had not been paid or receipted, except as above stated. This action was brought by appellee Frank, and the complaint contained the common counts, for money paid, laid out, and expended by Black, for defendant Finnegan, at his request; for money loaned, and on an account. It also, contained three special counts, framed on the charter party, averring the injury to the boat; that it was repaired at the request of Finnegan; that Black could not obtain possession of it until he paid Seawell for the repairs that he had put on it; that Black obtained possession of the boat in this way, and assigned his claim against Finnegan to the plaintiff. The court charged the jury: "That by the terms of the charter, the defendant assumed all liability for wear and tear, and would be liable for any damage done to the boat during the continuance of the charter."

The defendant excepted to this charge of the court, and requested the following charges:

"1. If the jury believe, from the evidence, that Black chartered the steamboat "Peerless" to defendant, and that said boat had competent officers and crew aboard of her, and while being used to transport freight and passengers on the river, she was damaged by a blow or storm, without any fault or negligence of the officers or crew of said boat, that then the plaintiff cannot recover for any damage done to said boat because of said blow or storm.

"2. That if the jury should believe, from the evidence, that the steamboat "Peerless" was chartered to defendant, and during the time she was chartered there were competent officers and crew on board of said boat, and whilst said boat was in the ordinary use for which she was chartered, and while being so used the boat, by an inevitable accident, was damaged, without any fault or neglect of the officers or crew, or



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either of them, on board said boat at the time, that then they should find for the defendant.

"3. That by the terms of the charter, the charterer was to return the boat in the same condition as when she was received by the defendant, "ordinary wear and tear" excepted. That under the charter party, the charterer is not liable as an insurer against the perils of the river, risks of navigation. If the jury should believe from the evidence that said boat had on board competent officers and crew at the time she was damaged, and at that time the said boat was in the ordinary use for which she was chartered, and while being so used she was damaged by the blowing wind or storm, without any fault or neglect of the officers or crew of said boat, that then they should find for the defendant.

"4. If the jury should believe, from the evidence, that said boat was chartered by Andy Black to defendant, and while so chartered she had competent officers and crew on board said boat, and while said boat was in the ordinary use for which she was chartered, she was damaged by an inevitable accident, over which the officers and crew had no control, and without any fault or neglect of the said officers and crew, or either of them, that then the plaintiff cannot recover."

These charges the court refused to give, and the defendant excepted.

There was a verdict and judgment for the plaintiff. The refusal of the charges is assigned as error.

BOYLES, FAITH & CLOUD, for appellant.—1. The evidence shows that the money due for repairing the boat had not been paid at the time of suit brought. Hence, there was no evidence to support the verdict, and the judgment should be reversed.—32 Texas, 606; 6 Nev. 175; 31 Iowa, 477; 23 La. An. 501.

2. The fourth and fifth clauses of the charter party contain inconsistent provisions, but when construed together it is the manifest intention to except ordinary wear and tear. There was no ordinary wear and tear, but the boat was damaged by an inevitable accident. In such a case, it is the duty of the owner to keep the boat in good repair.—2 Parsons Mar. Law, 599; 6 Mass. 63; 3 Johns. 44.

3. The charterer did not become the insurer of the boat, and for the injury resulting from an inevitable accident or act of God, he cannot be made liable.—3 Stew. & Port. 135; *Ames v. Belden*, 17 Barb. 513; 1 Benedict, 440.

4. As to the other rulings of the court, see 1 Woods C. C. 273; 11 La. An. 624.

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W. D. MCKINSTRY, for appellee.—1. It is the duty of the court to construe written instruments.—31 Ala. 108; 3 Ala. 237; 19 Ala. 605; 23 Ala. 652; 26 Ala. 371; 27 Ala. 259; 18 Ala. 720; 32 Ala. 569; 36 Ala. 496. The court correctly construed the charter so as to make appellant liable for any damage to the boat during its continuance.—22 Ala. 382; Chitty on Con. 14; Chitty on Pl. 524; 6 T. R. 650; *Ib.* 750; 10 East. 530; Peters' C. C. 86; 4 E. & Bl. 963; 7 E. & Bl. 763; 26 Me. 361. Plowden, 284.

2. The court correctly refused to give the charges asked by appellant for he could not excuse himself on the ground that the injury to the boat was the result of an inevitable accident. When a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity.—4 Port. 170; 2 Parsons on Con. (6 ed. note h.) 672; 22 Ala. 382, and cases *supra*.

STONE, J.—The cause of action declared on in this case is a claim for work and labor done, at the request of defendant, appellant here. It is brought in the name of Frank, and the concluding sentence of the complaint is in the following language: "Which said sum of money, with the interest, is now due, and is the property of the plaintiff." This count fully sets forth all the constituents of an implied contract to pay money; for it avers that the defendant caused the repairs to be put on the boat. It fully complies with the statute, which authorizes such action to be "prosecuted in the name of the party really interested, whether he has the legal title or not."—Code of 1876, section 2890. If the averments of the complaint are proved, Finnegan is liable for the repairs, as for work and labor done at his request; and, as he interposed no sworn plea denying Frank's ownership of the claim, and right to sue upon it, that question was not raised in the court below, and no question can be raised upon it here. Rule 29 of Practice in the Circuit Court. See form 8, of Complaints—Code, page 702. The bill of exceptions purports to set out all the evidence, and it shows the repairs were done at the instance of Finnegan. Under these principles, the plaintiff was clearly entitled to recover, without any reference to the terms of the charter party.

It is contended for appellant, that paragraphs 4 and 5 of the charter party are somewhat incompatible, and that the latter must be construed as explaining, qualifying and dominating the former. Properly construed, we think there is no incompatibility between them. Paragraph 4 contains a provision that is somewhat uncommon. Its language is,

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“that the party of the second part—(Finnegan)—shall assume all liability for \* \* all and every wear and tear of said steamer Peerless; and should the party of the first part, and party of the second part disagree as to such wear and tear, then it shall be left to arbitration, and such arbitration shall be binding on the respective parties to this charter.” This is a clear obligation on the part of the charterer to make good the wear and tear of the steamer during his possession of it. The 5th paragraph is as follows: “The party of the second part agree to return to the party of the first part, at the expiration of the charter, the steamboat Peerless in the same condition as when received, ordinary wear and tear excepted, as set forth in the preceding section four.” Now, the rule for construing written instruments is, to give operation and effect to every clause, if it can be done. We do not presume parties intend to insert contradictory clauses in their written contracts. We industriously search for some interpretation which will reconcile them. Paragraph 4, with distinct particularity, declares that the charterer shall make good, by compensation, the wear and tear of the steamboat. He could not replace that which would be lost or suffered by wear and tear. That was a physical impossibility. He could and would compensate for it, however, by paying to the owner a sum equal to the deterioration the boat would necessarily sustain in the use. This he bound himself to do, in paragraph 4. Paragraph 5 relates to the return of the boat, at the expiration of the bailment or charter. It could not be returned free from wear and tear, the necessary consequence of use. It could be returned “in the same condition as when received, ordinary wear and tear excepted.” Repairs, if needed could restore it to that condition. Paragraph 4 provided for making good the losses incident to ordinary wear and tear. That injury was inevitable. But there might be other injury. Paragraph 5 made provision for it; but inasmuch as paragraph 4 had already provided compensation for losses caused by ordinary wear and tear, it was neither necessary nor proper that a second provision should be inserted to meet them. Hence, the 5th paragraph, after providing for the return of the boat in the same condition as when received, excluded the question of wear and tear from its operation, and left it controlled by paragraph 4 alone. “In the same condition as when received, ordinary wear and tear excepted, as set forth in the preceding section 4,” is its language.

Charter parties, like most other contracts, are made to assume very varying forms. Sometimes the owner parts only with his interest in the freights, retaining the command



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and control of the vessel. A class of such contracts may be found, in which only partial dominion and direction of the ship or boat is parted with. In yet another class, the bailment is complete, and the charterer, during the continuance of the contract, has absolute control of the vessel, its voyages, manning and direction. Parties, as a rule, can make their own contracts, can make them more or less binding; and when no rule of law or public policy is contravened, courts have no discretion but to enforce their contracts as they make them. In the class last-above stated, the charterer, for the time, is clothed with all the rights, and subject to all the duties and liabilities which attach to ownership. — Abbott on Ship. marg. page 57, and note; *Keene v. Davis*, 1 Adolph & Ellis, 312; *Pontchartrain R. R. Co., v. Heirne*, 2 La. Annual, 129; *Cutler v. Thunlo*, 20 Me. 213; *McCarter v. Hinton*, 15 Johns. 298; *Perry v. Osborne*, 5 Pick. 421.

Under the contract of charter in evidence in this case, Finnegan, during his term, became the *quasi* owner of the steamboat, entitled to all the benefits of ownership, and subject to all its liabilities, including those incurred for necessary repairs. — 2 Wait's Actions, 157; *Steele v. Burk*, 14 Amer. Rep. 60.

Under the principles above declared, none of the rulings of the Circuit Court did the appellant any injury.

Affirmed.

## The American Union Telegraph Company v. The Western Union Telegraph Company.

*Bill in Equity by Telegraph Company to Enjoin another Telegraph Company from impeding or obstructing the Construction of its Lines.*

1. *Foreign corporations, constitutional prohibition as to doing business in this State, not violative of the federal constitution.* — The provision of the constitution (art. XIV, § 4) that "no foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent therein," is a legitimate exercise of the police power of the State, is not in conflict with any act of Congress, nor violative of any provision of the Federal Constitution.

2. *Same; when equity will not aid by injunction.* — A court of equity will not interfere by injunction at the suit of a foreign telegraph company to prevent a rival company from obstructing the erection of its poles and wires, when the

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bill does not show that the complainant has any known place of business or any agent in this State, nor that it has acquired any property or rights of property here.

3. *Same; State cannot prohibit telegraph company from doing business within its limits.*—The congress of the United States having exercised its power to regulate commerce between the States as to the construction of telegraph lines, no State can directly, or indirectly, by legislative prohibition or otherwise, exclude a foreign telegraph company from doing business within its limits.

4. *Same; when State may regulate business of, within its limits.*—The constitutional power of congress to regulate commerce does not exclude the exercise of a concurrent power by the States, except so far as congress has actually exercised the power; and no act of Congress is to be interpreted as invading the police powers of the State, unless the intent is clear and obvious.

### APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill filed by the American Union Telegraph Company against the Western Union Telegraph Company. The bill avers, that the American Union Telegraph Company is a corporation created by the laws of the State of Louisiana and domiciled in the city of New Orleans; that the purpose and object of said corporation was to erect, maintain and operate lines of telegraph in Louisiana and in the adjoining States; that its purpose was to erect telegraph lines along the right of way of certain railroads, which are named and described, and which are within the State of Alabama; that said company had accepted the provisions of the act of Congress approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure the use of the same for postal, military and other purposes" that the secretary of the company had notified the Postmaster General, who had accepted the resolution of said corporation to that effect, and had ordered it filed; and that all said railroads were public highways and post-roads of the United States. The bill further avers, that the Western Union Telegraph Company claims the exclusive right to run their lines along the right of way of said railroads, and that they threaten to impede and obstruct the complainant in erecting and operating their lines thereon.

The bill fails to show that complainant had obtained any property in this State, or that it had any place of business or any authorized agent therein. It also fails to show that complainant had obtained any right of way, or constructed or attempted to construct any line of telegraph therein. An injunction was prayed for, and a temporary injunction to restrain the Western Union Telegraph Company from interfering with complainants in setting up and operating lines of telegraph was granted. The defendant answered, moved to dismiss the bill for want of equity, and to dissolve the injunction. It also demurred to the bill, assigning, among other

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grounds not necessary to be noticed, the following, viz: 1. The bill fails to show that complainant had secured any right at law or in equity which defendant had injured or molested, or had attempted to injure or molest. 2. Because the bill fails to show that complainant has any known place of business or any authorized agent in this State.

The chancellor dissolved the injunction and dismissed the bill, and the American Union Telegraph Company appealed to this court, assigning the said decree as error.

H. PILLANS, for appellant.—The bill shows that the American Union Telegraph Company was organized to construct and operate lines of telegraph in this, and other States, and that it has accepted the provisions of the act of Congress of July 24th, 1866, relating to the construction of telegraph lines. Rev. Stat. U. S. § 3964. Railroads are public highways and post-roads.—Const. Ala. Art. XIV, 21; *Olcott v. Supervisors*, 16 Wall. 697. Appellant had a clear right to construct and operate their lines on said railroads.—Rev. Stat. U. S. § 5263; Const. Ala. Art. VI, § 11; Art. XIV, § 21; Code of 1876, §§ 1930–1932. Having the highest sanction of State and Federal authority, they might build on said roads at will, after obtaining the consent of the railroad companies or condemning the easement in their hands and paying for it. They have only to obtain the consent of the railroad companies, and it is against them alone that they take proceedings to condemn the easement.—Code of 1876, §§ 1930–1932. This clear right the defendant threatened to impede and obstruct. No railroad company can limit the State's exercise of its power of eminent domain, nor can it, being a post-road, exclude a telegraph company from its right of way.—*N. O. & M. R. R. v. So. & At. Tel. Co.*, 53 Ala. 211; *Pensacola Tel. Co. v. Western U. Tel. Co.* 6 Otto, 1; 8 Green's Brice's Ultra Vires, 5, 6; *Thomas v. R. R.* 101 U. S. 71; 36 Ala. 317; 31 Ala. 82. It is of no consequence to appellees how the appellant acquired the right of way.—Code 1876, § 1930 *et seq.*; 53 Ala. 211. This bill is in the nature of a bill *quia timet*; it is to restrain the commission of a threatened nuisance of an injurious character to the public. It shows a clear right in complainant, and irreparable injury and vexatious suits impending. Equity will grant an injunction *in limine* in such cases.—High on Inj. 572; 2 Story Eq. 826, 922, 923; *Wheeling and Belmont Bridge Case*, 18 How. 508; *Burden v. Stein*, 27 Ala. 104; *Lide v. Hadley*, 36 Ala. 627; *Wright v. Moore*, 38 Ala. 593; *Mayor v. Rogers*, 10 Ala. 37; *Croton Turn. Co. v. Ryder*, 1 J. Ch. 615. If the threatened injury is a trespass, equity may interfere. High Inj. 21; *U. S. v. Duluth*, 1 Dillon C. C.; 5th Ohio, 139;



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6 J. Ch. 497; 27 Ala. 104; 36 Ala. 627. The right need not be first established at law, and a legislative grant is equivalent to establishing the right at law.—1 J. Ch. 611; 31 Me. 362; 2 Dan. Ch. Pl. 1623 (note). Complainant, although a foreign corporation without officers established in this State, may have this remedy.—*Mayor of Columbus v. Rodgers*, 10 Ala. 37, 49. It is not yet doing business here, nor seeking to enforce any rights growing out of its exercise, and they have the Congressional and State license to pass through the State. This franchise is in its possession, and it will be protected.—*Boston R. R. v. Salem R. R.*, 2 Gray, 27; *Gates v. McDaniel*, 2 Stew. 211; 7 Conn. 50, 51. Complainants' rights were vested by their acceptance of the benefits and burdens of the act of congress of July 24, 1866.

GAYLORD B. CLARK, and FRANK B. CLARK, JR., for appellee. The bill was properly dismissed. The appellant is a foreign corporation, and must show, before it can acquire any right, that it has at least one known place of business and an authorized agent or agents in this State—Const. of Ala. Art. XIV, § 4; and it must show that it has acquired the right to construct its lines on the particular railroads mentioned in the bill, either by contract with their owners or by proceedings *in invitum*, and payment of just compensation for the property taken or destroyed.—Const. of Ala. Art. XIV, § 4; Art. 1, § 24; Code of 1876, §§ 1930-1-2. These sections only give to foreign corporations a mere license to do business in this State, but they do not vest in them *ex vi termini*, or by legal construction, any legal right to carry on such business over any particular railroad or any particular property; and they imply that the railroad companies have such a property in the right of way as to furnish a valuable consideration for a contract granting it to another. Before the right to take any particular property can be vested, the proceedings must be had and an award made pursuant to sections 3580 to 3600 of the Code. There is no pretense in the bill that these prerequisites to the establishment of the right claimed have been complied with, and no suggestion that they will ever be complied with. If the appellant had, at the time this bill was filed, attempted to do what it says the Western Union Telegraph Company obstructed it in doing, it would itself have been a trespasser.—*B. O. & M. R. R. v. Smith*, 49 Me. 9; *M. & C. R. R. v. Payne*, 37 Miss. 300; *Henry v. R. R.*, 10 Iowa, 540; *Powers v. Beers*, 12 Wis. 212; *Commissioners v. Dunham*, 43 Ill. 86; *Graham v. R. R. Co.*, 27 Ind. 260; *Washburn v. Miller*, 117 Mass. 376; Mills on Eminent Domain, 90; 128, 130. An interlocutory injunction is only proper to

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preserve the *statu quo* until conflicting rights can be settled ; nor does it matter that the contemplated work is a public improvement—High on Inj. 47 ; *Spenrice v. Wallace*, 37 Miss. 172. Appellant not being in the possession and enjoyment of any rights which the defendants are attempting to infringe, the court will not decree an injunction.—*Enfield Bridge Co. v. Conn. River Co.*, 7 Conn. 30 ; *Youngblood v. Youngblood*, 54 Ala. 486 ; *Boulo v. N. O. M. & T. R. R.*, 55 Ala. 480 ; 3 Waite's Actions and Defences 685 ; Brickell's Digest, 673, 472, 473. A bill not disclosing a case for equity is fatally defective, and it may be taken advantage of at any stage of the proceedings.—*Teague v. Wade*, 59 Ala. 369.

SOMERVILLE, J.—The bill in this case was filed by the appellant against the appellee, claiming to be organized as a body corporate under the laws of Louisiana, and showing itself entitled, as a telegraph company, to the benefits of the act of Congress of July 24, 1866, relating to the construction of telegraph lines, over the public domain, across navigable streams, and along “any of the military or post-roads of the United States.”

The complainant does not allege the possession or ownership of any property whatever, in the State of Alabama, except its corporate franchise, nor does it claim to have acquired by contract, condemnation or otherwise, any right of way for the construction of its lines within the territorial jurisdiction of this court. It is, however, averred, that the appellee (the defendant in the bill) threatens to harrass, impede and obstruct complainant, so as to delay or prevent the construction of such work or enterprise, which it has a right to prosecute under the license authorized by the said act of congress. It is claimed that these threats, if executed, will produce irreparable damage and the bill prays an injunction to restrain the execution of them. The case was submitted on demurrer and motion to dismiss for want of equity, and the chancellor sustained the demurrer, dismissed the bill and dissolved the temporary injunction.

Section 4, art. 14 of the Constitution of 1875 provides that “no foreign corporation shall do any business in this State without having at least *one known place of business* and an *authorized agent* or agents therein, and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State.”

This clause of the Constitution is prohibitory and needs no legislation to carry the mere prohibition into effect, or to give it force. The bill, filed by the appellant corporation, fails to aver that it has any place of business or an author-

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ized agent in the State of Alabama. It has, therefore, presumptively no lawful right to do any business in the State by reason of this Constitutional prohibition, provided the clause in question is not violative of the Constitution of the United States, or of any law enacted by Congress pursuant thereto.

To this question we propose to direct our inquiry. Congress has power to regulate commerce with foreign nations and among the several States."—Const. U. S. Art. 1 § 8 par 3. The act of Congress, approved July 24, 1866 (14 Stat. 221; Rev. Stat. sec. 5263 *et seq.*) under which appellant claims its license, confers simply "the right to construct, maintain and operate lines of telegraph" along military or post-roads of United States, over the public domain or across navigable streams, and this law has been held by the Supreme Court of the United States to be a valid exercise of the power to regulate commerce between the States.—*Pensacola Tel. Co. v. West. Union Tel. Co.* 96 U. S. (6 Otto,) 1.

The same court had previously held, in *Paul v. Virginia*, 8 Wall. 168, that a State might exclude a foreign insurance company from its jurisdiction, and that such companies, when mere corporations find no protection in that clause of the Federal Constitution, which declares that the "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."—(Art. 4, § 2.) That was not, however, the case of a corporation engaged in inter-State commerce, such as a telegraph or railroad company, and as to these the rule is decided to be different.—(6 Otto, 1.) Admitting the soundness of this conclusion, we may concede its logical sequel, as enunciated in the case of *Pensa. Tel. Co. v. West. U. Tel. Co.*, *supra*, that no State can exclude such foreign corporations from doing business within its limits, directly or indirectly, by legislative prohibitions, or otherwise.

The power to regulate commerce is manifestly a dormant power until brought into activity. It covers a wide field and embraces many subjects, and to the extent that congress fails to exercise it in any given case, it seems to be conceded that it is a concurrent power and may be exercised by any State. As said, by Justice Swayne, speaking for the Supreme Court of the United States, in *Gilman v. Philadelphia*, 3 Wall. 713, (725). "Until this dormant power of the Constitution is awakened and made effective by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court."

This concurrent exercise of such a power by the Federal and State Governments is illustrated in the case of *Steamship*



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*Co. v. Joliffe*, 2 Wall. 450. There Congress had provided by law a system under which the master and owner of vessels, propelled by steam, were required to employ competent pilots to navigate such vessels on their voyage. The legislature of California passed an act entitled "An act to establish pilots and pilot regulations for the port of San Francisco." Mr. Justice Field, delivering the opinion of a majority of the court, says, speaking of the constitutional power under discussion. "But this clause does not, in terms, exclude the exercise of any authority by the States to regulate pilots, on the contrary, the authority of the States to regulate the whole subject, in the absence of legislation on the part of congress, has been recognized from the earliest period of the government." The two acts, the one passed by the general government and the other by the legislature of California, though both related to the same general subject matter, were declared consistent with each other and a valid exercise of legislative power. The California statute was clearly a police law or regulation, and was sustained, no doubt as such. In *Gilman v. Philadelphia*, *supra*, Mr. Justice Swayne recognized a familiar political axiom in American constitutional law, pertinent to this discussion, when he said: "The National government possesses no power but such as has been delegated to it. The States have all but such as they have surrendered."

In *Pensa. Tel. Co. v. West. Un. Tel. Co.*, *supra*, WAITE, Ch. J., said: "State sovereignty, under the constitution is not interfered with. Only national privileges are granted." And again: "Upon principles of comity, the corporations of one State are permitted to do business in another unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the State into which they come."

In the License Tax Cases, 5 Wall. 469, it was declared by CHASE, C. J. in behalf of the court, that a license to sell spirituous liquors, obtained from the General government, conferred no authority on the license to violate any police law or regulation of a State, in whose domain he might seek to exercise the right.

The police power of a State is a most important power, essential to its very existence, and has been declared by the supreme judicial interpreter of the Federal Constitution to embrace "the protection of the lives, health and property of her citizens, the maintainance of good order, and the preservation of the public morals; and the legislature," it is added, "cannot by any contract divest itself of the power to provide for these objects."—*Beer Co. v. Massachusetts*, 97 U. S. (7 Otto), 25.

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Without this valuable power, that protection of life, liberty and property, for which all government is established, could not be secured to the citizens of any commonwealth. No law of the general government is, therefore, to be interpreted as invading this power unless such intent is clear and obvious. The mandate of Sec. 4, of Art. 14, of the Constitution of Alabama, which requires foreign corporations to have a known place of business and an authorized agent, is just as much a police regulation for the protection of the property interests of its citizens as a law forbidding vagrancy among its inhabitants. It does not impede or obstruct unreasonably any right conferred on foreign telegraph corporate companies by the act of Congress of July 24, 1866, and is therefore free from constitutional objection. Nor do we design to intimate that any State law having such an effect would be constitutional.

The appellant corporation, in its bill, does not show that it is the possessor or owner of any property in the State of Alabama, nor in fact of any property, save its corporate franchises, acquired from a foreign jurisdiction. It neither claims to have purchased or condemned any right of way under its license. It does not claim to have constructed or attempted to construct any portion of its contemplated line of telegraph, or to have procured the material therefor. We do not think the protective and preventive jurisdiction of a court of equity, by the extraordinary process of injunction, can or should be invoked upon such a remote and speculative apprehension of injury. A complainant might, with as much reason, seek to enjoin waste upon a well-timbered tract of land for which he was negotiating, and a deed to which he expected to obtain the following day or ensuing week; or to ask protection by injunction against interference with a ferry franchise before he was the possessor or owner of the banks of the stream over which he proposed to run it.

The history of equity jurisprudence, we apprehend, fails to furnish a case of this character where there has ever been an interposition by injunction under the pretext of preventing irremediable damage, or on any other ground of chancery jurisdiction.—*Gates v. McDaniel*, 2 Stew. 211; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *Baird v. Shore Line*, 2 Blatch. 276; High on Inj. §§ 7, 8, 10; 3 Waite's Act. and Def. p. 685, § 9.

• There is no error in the decree of the Chancellor, and it is affirmed.

[Smith v. McGuire.]

**Smith v. McGuire.***Bill in Equity to Cancel Conveyance as Mortgage of Wife's Statutory Estate.*

1. *Equitable separate estate; what words create in deed.*—A conveyance to “the sole and proper use, benefit and behoof” of a married woman, whether these words are used in the usual granting clause, or in the *habendum*, create in her an equitable separate estate.

2. *Official acknowledgment of deed; its effect.*—The official certificate of the acknowledgment by a married woman of a conveyance passing her real estate, is a part of the conveyance and necessary to its validity; and, though it is not conclusive, the evidence impeaching it must be clear and convincing.

3. *Same; what evidence not sufficient to impeach.*—When the testimony relied on to impeach the certificate is based on the fraud and duress of the husband in procuring the wife's signature and the evidence of such fraud and duress proceeds from the husband and wife only, their credibility is affected by their interest; and when (as in this case) the testimony relates exclusively to occurrences between themselves, in the privacy of domestic life, and is uncorroborated by any other evidence, while the testimony is full and positive that the wife was informed of the contents of the conveyance, and that she voluntarily executed and acknowledged it, the evidence is not sufficient to overcome the certificate.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The appellant, Mrs. E. E. Smith, filed her bill to cancel a mortgage on a store-house and lot of land, in the city of Mobile. The property was conveyed to Mrs. Smith in 1866, and the *habendum* clause of the deed uses the following words: “to have and to hold,” &c., “to the sole and proper use, benefit and behoof of the said” &c.

Her husband, J. E. Smith, furnished the money to buy the property, but it was conveyed by his vendor to appellant. The husband becoming embarrassed in business and wishing to raise money on this property, authorized his brother, G. W. Smith, to negotiate the loan for him; the latter applied to Miller & Co., of Mobile, for a loan and proposed to secure it by a mortgage on the property, but this was refused. At the suggestion of T. P. Miller an absolute deed to the property was made by appellant and her husband, conveying the lot to G. W. Smith. This deed was rejected and returned to St. Louis, Mo., (where appellant and her husband resided), because it was not executed in the presence of two witnesses and was not properly acknowledged. A second deed was prepared and sent to J. E. Smith, which was witnessed and acknowledged. Thereupon, G. W. Smith borrowed from



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appellee, McGuire, through Miller & Co., \$4,000, the re-payment of which he secured by a deed of trust on this property. As soon as the loan was effected, G. W. Smith re-conveyed the property to appellant; the money received from the loan was given to J. E. Smith by G. W. Smith, and was used by the former in his business. The trustee in the deed being about to sell the property, Mrs. Smith filed this bill alleging that the property was her *statutory* separate estate; that her signature to the deed was procured by the fraud and duress of her husband; that she did not voluntarily execute it, and prayed that it might be canceled as a cloud on her title.

There was no proof of fraud or duress on the part of the husband except such as arose from his own testimony and that of his wife. They both testified that the wife's signature to the deed was not voluntary; that she refused to sign it until her husband threatened to kill her if she did not sign it; that she at last signed it for fear of losing her life; the husband also testified that he procured his wife's signature to the trust deed by threatening to kill her if she refused; he testified further, that he represented to her that he could soon pay off the mortgage on the property, and that as soon as a loan could be effected the property would be re-conveyed to her. The testimony of the notary, who took the acknowledgment, as well as that of his clerk, was that Mrs. Smith and her husband came to his office to acknowledge the deed, and that their son, who accompanied them, was called in as a witness to the deed and signed his name thereto as such. They also testified that they saw nothing like duress on the part of the husband, and that Mrs. Smith assented to the question or statement that she voluntarily executed the conveyance.

The Chancellor dismissed the bill, and his decree is assigned as error.

TAYLOR & MACARTNEY, and JAMES BOND, for appellant.

1. The property was the statutory separate estate of Mrs. E. E. Smith. The Supreme Court of the United States in the case of *Lippincott v. Mitchell*, 4th Otto, 767, decided that the precise words used in this deed, viz: "to her sole and proper use, benefit and behoof," did not exclude the marital rights of the husband, and the wife held a statutory separate estate. The intent to exclude the husband's rights must be expressed in clear terms.—*McMillan v. Peacock*, 57 Ala. 127; *Short v. Battle*, 52 Ala. 456; *Johnson v. Johnson*, 32 Ala. 637; *Huckabee v. Andrews*, 34 Ala. 646. In construing words of similar import, this court has decided that they did not have the

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effect of creating an equitable separate estate.—*Connor v. Williams*, 47 Ala. 133; 39 Ala. 619.

These words once answered an important purpose in the *habendum* of a deed. This clause of a deed Chancellor Kent declared had degenerated into “a mere useless form.”—4 Kent’s Com. 569; 2 Bl. Com. 298; Shep. Touchstone, 98; 2 Coke Lit. 283–4.

The deed to G. W. Smith and the mortgage by him to McGuire were merely parts of a device to obtain a loan on the wife’s statutory estate for the husband’s benefit, and are void.—*Williams v. Bass*, 57 Ala. 487; *Connor v. Williams*, 57 Ala. 131.

2. The deed of Mrs. Smith to G. W. Smith was procured by the fraud and by duress of her husband; an acknowledgment obtained by force, fear or compulsion passes no title.—30 Ala. 338; 1 Waite, 85; 6 Waite, 661; 13 Mass. 371; 18 Md. 319; *Schrader v. Decker*, 9 Penn. St. 14.

OVERALL & BESTOR, for the appellee.—The words “for her sole and proper use, benefit and behoof,” which are found in the *habendum* of the deed to Mrs. Smith, created in her an equitable separate estate which she could bind for her husband’s debt.—*Miller v. Voss*, *Taylor & Co.*, 63 Ala.; *Continental Insurance Co. v. Webb*, 54 Ala. 131; *Anderson v. Hooks*, 11 Ala. 953. The decision in *Lippincott v. Mitchell*, 4 Otto, 767, is opposed to the decisions of this court, and the rules of real property in this State are settled by the decisions of our own court.

2. “In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects.”—*Carpenter v. Longan*, 16 Wall. 276; 1 Jones on Mortgages, 549.

BRICKELL, C. J.—1. Through a long line of decisions, reaching far back in the past, it has been settled that the words of this conveyance, “to the sole and proper use, benefit and behoof,” when found in a conveyance as descriptive or definitive of the quality of the estate conferred thereby on a married woman, whether found in the usual granting or in the *habendum* clause, create in her an equitable separate estate, and of themselves, unless otherwise expressly limited, exclude the marital rights of the husband.—*Miller v. Voss*, 62 Ala. 122. These decisions have grown into land marks of property—have become elements and of the essence of titles to real estate, and without producing insecurity, and inviting litigation, they can not be questioned. We forbear all dis-

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cussion of the question they involve, and unless we were willing to unsettle the titles resting, and acquired in reliance upon them, can not now depart from them.

2. The official certificate of the acknowledgment by a married woman, of the execution of a conveyance passing her real estate, or the attestation of such conveyance by witnesses, form parts of the conveyance, and are indispensable to its validity. To the one or the other, as it may be found indorsed, or expressed on the face of the deed, the purchaser must look, to ascertain whether title has passed. The official certificate is not conclusive evidence of the facts recited in it. The force and effect accorded to a fine at common law, for which the certificate is usually said to be a substitute, can not be accorded to it. In Sheppard's Touchstone, 9, it is said, and such is the usual language of the ancient authorities: "if there be any woman that hath a husband, that doth join with her husband in the conveyance, the judges or commissioners must take care that they do examine her whether she be willing, and do part with her right in the land willingly, or by compulsion of her husband, yet hath she no way to relieve herself from it when it is done." A fine was a judicial proceeding of more solemnity and dignity than the acknowledgment of execution by a married woman, authorized by our statutes, which may be taken and certified by the most inferior judicial officers, and also by mere ministerial officers. We can not but be aware that in practice it is often regarded more as matter of form than of substance, and often all inquiry into the facts beyond that of mere signing the conveyance, is dispensed with; or if inquiry is made, it is in the presence of the husband, and so carelessly conducted that the willingness of the wife to join in the conveyance is taken for granted, rather than ascertained. The necessities of justice, the prevention of the deprivation of the wife of her estate, by the negligence of the officers of the law, or by their fraud, must compel an inquiry whether the certificate speaks the truth—whether the wife has acted freely and voluntarily, or in the transaction was subjected to the duress of the husband, or was the victim of fraud.—*Michener v. Cavender*, 38 Penn. St. 334; *Schroeder v. Dicker*, 9; *Ib.* 14. As the certificate forms part of the deed—is essential to its validity, and purchasers are invited to look to and rely upon it, all will admit that the evidence impeaching it, ought to be clear, convincing, and conclusive, reaching a high degree of certainty, leaving upon the mind no fair, just doubts.—*Barrett v. Proskauer*, 62 Ala. 486. Otherwise, there would be the most painful uncertainty and insecurity in regard to the titles to a large, if not the larger, part of the real estate of



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the State which is, and has been for years past the subject of individual alienation. When the testimony proving the fraud or duress, as in the case before us, proceeds from husband and wife only, their credibility is affected by their interest. The statute renders them competent witnesses, but it does not remove, or undertake to remove, the considerations affecting their credibility, arising from their relation, and their interest in the issue, which the wife forms. If the conveyance is annulled, the wife is restored to her title, and the husband to an enjoyment with her of the estate, and the contingent estate which may accrue if he survives her—prejudice or bias, arising from the relationship of the witness to the parties or to the matter in controversy, though not disqualifying, was at common law, and is now a circumstance affecting credibility. The common law rule, excluding the witness who had a direct, immediate interest in the event of the suit, whose interest conflicted with his duty, and the rule permitting his bias to be shown to affect his credibility, were founded on the known frailties of human nature, not less to-day, than when the rule of exclusion was rigidly enforced. The credibility of a witness is also affected more or less by the circumstances under which he testified, and by the consistency of his evidence, with other evidence which must be accepted as true. Here is a husband once of ability to give the wife the property in controversy, without embarrassing his active business operations, or impairing the rights of creditors. He is reduced to insolvency, and the property is about to be taken for the payment of his debts, and must be, unless by his own oath and that of his wife, fraud and threats of violence to her, compelling her into the conveyance, shall be openly confessed. Yet, when the conveyance was executed, when it was acknowledged and certified, there was not a fact or circumstance indicating that the wife was not acting freely and intelligently, and there are more affirmative facts indicating her full knowledge, and unbiased volition, than generally attend such transactions. Witnesses to the execution of the deed being desired, they call their own son as one of them, and he attests in ignorance that the shame of his father and the oppression of his mother are concealed in the act, he could hereafter, and would be compelled to testify was free, voluntary, and intelligent. A former deed of the premises had been executed for the same purposes as this conveyance, but not in the form prescribed by the statutes. Not answering the purposes, they were advised it was necessary to execute the present conveyance, attested by witnesses, and properly acknowledged before an officer having authority to take and certify the acknowledg-

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ment of conveyances. If the former conveyance was freely and voluntarily executed, it would be a strong circumstance in support of the present conveyance, as would coercion in the execution of that conveyance cast suspicion upon the present. Yet these witnesses are silent in reference to the former, contenting themselves with impeachment of the present conveyance. It may be the husband and wife testify truthfully; and he is and has been the false husband, and vile tyrant he confesses himself, but the security of the titles to real estate, bearing evidence of validity the law prescribes, requires that they should not be disturbed without corroborating evidence, proceeding from disinterested witnesses, or some fact or circumstance in corroboration attending the transaction. The evidence of the notary and his clerk, is full, that the wife was informed of the contents of the conveyance, voluntarily executed, and acknowledged the execution. In the absence of a fact in corroboration of the evidence of husband and wife, the official certificate ought not to be overturned.—*Miller v. Marx*, 55 Ala. 322. The evidence which renders it nugatory and void, converting the conveyance into mere waste paper, should not be beclouded with circumstances of suspicion, or if it is, ought to be corroborated. Especially is this true when the evidence in impeachment proceeds only from the husband and wife, refers only to occurrences between them in the privacy of domestic life, is easily fabricated and almost impossible of contradiction.

Affirmed.

## Hild v. The State of Alabama.

*Burglary; when may be committed by person in charge of house.*—An employe left in charge of a house, who enters a closed room and steals therefrom, when, by virtue of his employment, he had no right to go there, is guilty of burglary.

APPEAL from Mobile City Court.

Tried before Hon. O. J. SEMMES.

Charles Hild was indicted for burglary in breaking and entering the dwelling house of V. S. Davis, with intent to steal. Hild was a farm laborer employed by Davis, and lived in the same house with him. Davis went to Mobile, leaving Hild in charge of the premises, and on his return found that his room had been entered, and various articles

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of clothing had been stolen. The defendant was absent, but confessed that he had taken the articles. Davis testified that the defendant, although he was left in full charge of the house, had no right to go into his room, and that the doors of his room were closed but not locked. The defendant requested the court to charge the jury, "that if they believed, from the evidence, that the room of Mr. Davis fell within the trust and employment imposed on the defendant they must find him not guilty of burglary." This charge the court refused to give and defendant excepted.

The defendant was convicted, and the refusal to give the charge set out above is the error complained of.

W. E. RICHARDSON, for the defendant, cited 2 Hale's Pl. Cr. 354; Clark's Manual, 847; 1 Russell on Crimes, 794; *Edmond's case*, Hutton's Rep. 20; *S. C.*, Kilyng (King's Bench), 67.

H. C. TOMPKINS, Attorney-General for the State, cited *Lowder v. The State*, 63 Ala. 143; *U. S. v. Bowen*, 4 Cr. C. C. 604; *Gray's case*, 1 Strange, 481; Cornwall's, 2 *Ib.* 881; Hutton's Rep. 20; 2 Russell on Crimes, 7-11.

STONE, J.—The charge asked and refused in this case is not reconcilable with the principle settled in *Lowder v. The State*, 63 Ala. 143; see also, Clark's Manual, 847. Moreover, it is doubtful if this charge was not calculated to mislead. The City Court did not err in refusing to give the charge asked.

Affirmed.

## Lott v. Graves.

### *Petition by Administrator to Sell Lands to Pay Debts.*

1. *Funeral expenses of wife, must be borne by the husband.*—The law casts on the surviving husband the duty and legal obligation of burying his deceased wife, and of paying for the proper funeral expenses.

2. *Equitable separate estate of wife, not charged except by her.*—No one except the wife, by her own contract, can create a charge on her equitable separate estate, and no one can after her death incur any debt for which such estate can be made liable.

APPEAL from the Probate Court of Mobile county.

Heard before Hon. PRICE WILLIAMS.



[Lott v. Graves.]

Appellee Graves filed his petition in the Probate Court of Mobile, praying for letters of administration on the estate of Clara E. Lott, who was the wife of the appellant Lott.

This petition averred that petitioner was the largest creditor of said intestate; that his claim was for the funeral expenses; that the property of said estate consisted wholly of realty, which was the equitable separate estate of Clara E. Lott; that appellant was insolvent; that the funeral expenses were incurred by appellee wholly on the faith and credit of said estate; that said expenses were essentially necessary for her suitable interment.

Letters were granted to appellee by the court, and subsequently he filed a petition to sell the land for the payment of debts.

Appellant, and the heirs of Mrs. Lott demurred, because the petition did not show:

1. That the land was the equitable separate estate of Mrs. Lott, and the petition did not show that the claim for the payment of which it was sought to be sold was founded on any contract, either express or implied, made by Mrs. Lott.

2. Because the debt was for funeral expenses, and was the debt of the husband.

3. Because the petition showed that the debt was contracted after the death of a married woman by some one, and that her separate equitable estate was not liable for it.

The court overruled these demurrers.

Appellee testified that the articles composing his claim against the estate were ordered by the husband of Mrs. Lott at the time of her death; that Mrs. Lott "made no bill with him" during her life; that he knew of only one debt against the estate, viz.: his own account for the funeral expenses; and that no claims had been filed against her estate.

Appellant then made a motion to vacate the letters of administration which had been granted to appellee, on the ground that the testimony showed, that while the letters had been granted to Graves as the largest creditor of the estate, he was not a creditor of Mrs. Lott, but of her husband, and because it appeared that no claims had been filed against the estate, and it had not been shown that there were any creditors.

The court overruled this motion and granted an order to sell the land for the payment of debts. This action of the court is assigned as error.

OVERALL & BESTOR, for appellant.—At common law it was the duty of the husband to maintain the wife while living and to bury her when dead, and this duty is in no way im-

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paired or lessened by the fact that the wife may have or leave an equitable or statutory separate estate.—*Gunn v. Samuels*, 33 Ala. 201; *Smyley v. Reese*, 53 Ala. 97. Nor does it matter that the husband is insolvent.—*Gunn v. Samuels*, *supra*.

Here, after the death of the wife, an attempt is made to fasten a charge on her equitable separate estate on a contract not made by her, but by her husband, with a third party. "Without the concurrence of the wife the husband cannot by any contract, not even for necessities, create a charge on the wife's equitable separate estate."—*O'Connor v. Chamberlain*, 59 Ala. 439; also, 63 Ala. 447.

Nor can this claim be supported on the ground that the law creates a charge on the estate for its payment, without regard to any contract.—*Smyley v. Reese*, 53 Ala. 97.

The testimony shows that the claim of appellee was founded on a debt of the husband.

JAMES BOND, for appellee.—Nothing is of more imperative necessity than the burial of the dead. When a person dies who leaves no estate, the expense of burying him is a charge on the county where he dies.—Code, § 1748. When the deceased leaves an estate, the funeral expenses are a preferred charge on that estate.—Code, § 2430. And these expenses are a charge on the estate independent of any question of contract.—See *Rapelyea v. Russell*, 1 Daly (N. Y.); *United States v. Eggleston*, 4 Sawyer, 199.

Under section 2429 of the Code, the lands can be charged with the payment of the funeral expenses, because *all* the property of a decedent is charged with the payment of his debts.

The husband is liable at common law to pay for the burial of the wife, but when a wife dies leaving a large estate, while the husband is poor, shall the wife be buried at the expense of her own estate and in accordance with her station, or shall she be buried as a pauper, at the expense of the county? A father is as much bound to maintain and bury his child as a husband is to perform these duties towards his wife. In the case of a child, an allowance will be made to the father for the payment of funeral expenses out of the child's estate. *Watts v. Steele*, 19 Ala. 656; *Beasley v. Watson*, 41 Ala. 234; 2 Brick. Dig. 292.

There is no difference in principle between these cases and an allowance to the husband out of the wife's estate for the payment of her funeral expenses.

As to the motion to vacate the letters, see *Curtis v. Williams*, 33 Ala. 570.—Code, §§ 2350, 2351.

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STONE, J.—The law casts on the surviving husband the duty and legal obligation of burying his deceased wife, and of paying for the proper funeral expenses. No one, except the wife by her own contract, can fasten a charge on her equitable separate estate. It follows that neither the surviving husband, nor any one else, after the death of the owner of such estate, can incur any debt, for which the estate can be made liable.—*Gunn v. Samuel*, 33 Ala. 201; *Smyley v. Reese*, 53 Ala. 89. The expense of burying Mrs. Lott was in no sense a debt due from her estate, and could not constitute the owner of such claim a creditor of her estate. Graves, not being a creditor of hers, had no claim or right, on that account, to the administration of her estate, and the claim was not a debt, to justify the sale of her property for its payment.—*Owens v. Childs*, 59 Ala. 113; *Garrett v. Bruner*.

Reversed and remanded.

## McCarthy v. Zeigler.

*Appeal from Judgment rendered by Court on Facts, a Jury being Waived.*

1. *Supreme Court; power to review case submitted to decision of court without jury.*—When an issue of fact is submitted to the decision of the court in a civil action without the intervention of a jury, this court can only review the sufficiency of the facts to support the judgment when there has been a special finding which has been reduced to writing and entered on the minutes of the court.

2. *Special finding; what is not*—The sole question of fact being the delivery, *vel non*, of a deed by the deceased grantor in his life-time, the bill of exceptions set out all the evidence adduced and added: "Upon this evidence, the cause was submitted to the court as a question of law, whether the said grantees held the title to said property under said conveyance, or whether the property belonged to the estate of the deceased grantor, and to the rulings upon said finding of facts the plaintiff excepted," while the judgment entry, after reciting the submission of the cause to the court without a jury, added, "and the court upon due consideration of the same, is of opinion that the plaintiff is not entitled to recover." *Held*, that the record did not show a special finding on the facts, and this court could not revise the judgment.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

No statement of facts is necessary.

G. L. SMITH, for appellant.



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OVERALL & BESTOR, for appellee.—As this cause was submitted to the court without the intervention of a jury this court will not revise the action of the Circuit Court in its decision of the facts.—18 Ala. 566.

SOMERVILLE, J.—Where, in a civil case, a jury is waived by the parties, and an issue of fact is submitted to the determination of the court, it is provided by the statute, that “in such case the finding of the court upon the facts shall have the same effect as the verdict of a jury.”—Code (1876), § 3029. It is further provided that this court, in the exercise of its appellate jurisdiction, may review the sufficiency of the facts to support the judgment of the inferior court only where there has been a *special* finding of the facts at issue between the parties.—Code, §§ 3030-31.

The sole question of fact to be determined in this case was, the delivery or non-delivery of a certain deed to real estate executed and duly acknowledged by one James McCarthy, but retained in his possession until his death, when it was obtained by the grantees under claim that it had been constructively delivered to them during the grantor's life.

The evidence bearing on this issue was not without conflict, and is recited in the bill of exceptions, which concludes, thereupon, as follows: “Upon this evidence the cause was submitted to the court to decide, as a *question of law*, whether the said trustees, Christopher and Kate Johnson [the grantees in the conveyance] held the title to this property under the said instrument, or whether the property belonged to the estate of James McCarthy and entitled the administratrix to the rents from said Zeigler, the defendant. And to the rulings of the court upon said *finding of facts* the plaintiff excepted,” &c.

The record fails to disclose any such “special finding of facts” as is demanded by the statute before this court can assume jurisdiction to review the conclusions of the Circuit Court on the evidence. This finding is required to be not only *special*, as opposed to a general finding, but is required to be “reduced to writing and entered upon the minutes of the court.”—Code, § 3030.

The judgment entry, in its recitals, does not fulfill the actions of the statute. After stating that the case was submitted for trial without the intervention of a jury, it concludes as follows: “And upon due consideration of the same the court is of opinion that the plaintiff is not entitled to recover, and hence judgment is rendered for the defendant.” This was a general and not a special finding by the court, and the assignment of error based on an exception to

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it does not authorize us to revise the judgment of the lower court on the evidence. Such judgment is conclusive in the appellate court, and no more the subject of revision than would be the verdict of a jury in a common law court. Code, § 3029; *Etheridge v. Mulempre*, 18 Ala. 566.

The judgment is affirmed.

## Underhill, Receiver, v. The Mobile Fire Department Insurance Company.

*Bill in Equity to Declare Transfer of Stock void, and for an Account.*

1. *Statute of limitations, applies in equity to bill for conversion of stock.*—Six years is the statutory bar to an action at law for the recovery of damages for the conversion of personal property, and the same limitation applies to a suit in equity which seeks to hold the defendant responsible for the conversion of shares of stock in an incorporated association.

2. *Same; defense of; when available on demurrer.*—When a bill in equity shows on its face that the claim asserted is barred by the statute of limitations, the defense is available on demurrer, and, if facts exist which take the case out of the operation of the statute they should be averred in the bill.

3. *Same; when does not run.*—The general principle is well settled that the statute of limitations does not run when there is no one who has the right and the capacity to sue, and when there is no one capable of being sued; but the qualification of the principle is equally well settled, that when the statute has once commenced to run, it does not cease running on account of any intervening disability to sue or be sued.

4. *Indefiniteness in bill; complainant has no advantage from.*—The complainant in a bill can claim no advantage or benefit from the indefiniteness of its allegations since he is presumed to state his case as fully as the facts will justify.

5. *Same; begins to run on appointment of special administrator.*—A special administrator, though appointed with reference to the pendency of a particular suit, has the same power of collecting and preserving the assets, and of maintaining suits for that purpose as a general administrator, and hence, the statute of limitations runs from the time of his appointment.

6. *Same; ignorance of right will not take case out of statute.*—Ignorance of his rights on the part of complainant, not superinduced by the fraud or connivance of the defendant, does not take the case out of the operation of the statute of limitations.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This bill was filed on the 21st day of November, 1877, against the Mobile Fire Department Insurance Company and Owen McMahon, by E. M. Underhill, appellant, as receiver of the assets of the estate of Edward McDermott, deceased. The bill stated that Edward McDermott, a citizen of Mobile,

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died there in November, 1866, leaving an estate composed of real and personal property, and among other things fifty shares of the capital stock of the Mobile Fire Department Insurance Company, of the face value of one hundred dollars each. That the stock stood on the books of the corporation in the name of Edward McDermott at the time of his death, and up to April 27, 1867, and the certificate of stock was also in his name; that after the death of Edward McDermott this certificate was found on deposit in bank. The names of all the heirs and distributees of Edward McDermott are set out, and the bill then states that James, the only surviving brother of Edward McDermott, residing at that time in Louisville, Kentucky, came to Mobile and found among the papers of Edward, an instrument purporting to be the last will of said Edward. This instrument was admitted to probate as the will of Edward McDermott on June 3d, 1867. That a special grant of letters of administration upon the estate of Edward McDermott was made to W. W. McGuire, the general administrator of Mobile county, for the sole purpose of enabling him to prosecute a suit in the Circuit Court of Mobile, which Edward McDermott had instituted before his death; that McGuire was dead; that no letters were ever granted to any one else on said estate. A copy of the paper which was probated as the will of Edward McDermott, is attached to the bill, which avers that as a will it was void, because vague and indefinite.

By this paper Edward McDermott gave all his property to his sister, Mary Agnes McDermott, in trust, "to support the contingent remainders, make entries and bring actions and subject to the bequests hereinafter made." The names of a number of persons are there mentioned, thus: "I give to A. — \$," no amounts or sums being anywhere stated. Mary Agnes McDermott, a Catholic nun, living in retirement was, the bill avers, unduly controlled and influenced by her brother James, and gave him a power of attorney by which she conferred on him all the power over the estate which she possessed, to sell, or dispose of it at discretion; that said James obtained possession of the fifty shares of the stock of the Mobile Fire Department Insurance Company on the 27th of April, 1867, in furtherance of his fraudulent purpose of converting to his own use the property of the estate, illegally and without authority, but claiming to act under the power of attorney given him by Mary Agnes McDermott, surrendered to said insurance company the certificate of fifty shares of stock, and had them transferred to himself as an individual, on the books of the company; that in 1870, James McDermott borrowed from Owen McMahon



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about \$1000, and being unable to pay the loan transferred to said McMahon the said fifty shares of stock, and had a certificate therefor issued to him. That said transfer was without authority and illegal, and that said insurance company could have ascertained the fact by the use of ordinary diligence; that dividends had been declared on said stock, which had been paid to said Edward McDermott and Owen McMahon; that said James McDermott, was in a "most fraudulent and outrageous manner, squandering the estate, until upon bill filed by the distributees to have the paper called a will construed and the said James to account and make settlement," appellant was on the 12th February, 1876, appointed receiver of the assets of the estate of Edward McDermott; that all the debts of said estate had been paid, but the time when they were paid is not stated. The bill prays for a discovery of the amount of dividends on the stock which were paid to James McDermott and Owen McMahon; that the transfer and surrender of the certificate of said stock be declared void; that the rights of complainant to said stock be settled; that said insurance company be decreed to issue a new certificate of stock in the name of Edward McDermott, or in the name of complainant as receiver. The defendant McMahon demurred to the bill because, "as shown by the bill the claim made, is, as against the defendant, barred by the statute of limitations of six years."

The Chancellor sustained the demurrer and dismissed the bill on July 5, 1878; on July 13, 1878, complainant proposed to amend the bill, but the Chancellor refused to allow the amendment. The decree of the Chancellor dismissing the bill, and his refusal to allow the amendment, are assigned as error.

R. INGE SMITH, for appellant.—There is no statute of limitations in Alabama which applies to the case made by the bill, and the right to bring actions subsists until the legislature limits it.—*Bedell v. Janney*, 4 Gil. 193; *Foster v. Cumberland R. R.*, 23 Pa. St. 371; 15 La. An. 1, 432; *Sneed* (Tenn.) 247. The statute does not run until there is some one entitled to sue.—3 Stew. 172; *Bohannon v. Chapman*, 17 Ala. 697; *Hopper, Adm'r, v. Steele*, 18 Ala. 328; *Lawson v. Lay*, 24 Ala. 134; *Wyatt v. Rambo*, 29 Ala. 510. The bill is not subject to demurrer unless it appears on its face that the complainant had the right to sue during the whole time prescribed by the statute of limitations, and in this case that the title of Edward McDermott and the distributees was openly repudiated.—*Shorter v. Smith*, 56 Ala. 210; *Edell v. Buchanan*, 2 Ves. 83. The bill here shows a fraudulent con-

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version, but no notice of it to the distributees. It shows that the receiver was appointed within less than two years before it was filed. There is no statute of limitations in this State, which prescribes the time within which administration must be taken on a decedent's estate; nor within what time a receiver shall be appointed to save the assets of an estate. When appointed, the administrator can sue for the assets and the statute does not begin to run till his appointment. 3 Stew., and authorities *supra*. The defendants and James McDermott were all administrators *de son tort*, and can not protect themselves by the statute of limitations.—32 Ala. 314; *High v. Worley*, 33 Ala. 709; *Blackwell v. Blackwell*, 33 *Ib.* 57. The bill does not show when the debts of the estate were paid, and hence, it does not appear when the equitable title of the distributees arose. The amendment should have been allowed. The complainant is not forced to meet the defense of the statute of limitations in his bill; he has, and should have, the right to amend after a demurrer to the bill is sustained.

BOYLES, FAITH & CLOUD, for appellee.—The demurrer of the statute of limitations was properly sustained. Edward McDermott died in 1866, and the receiver was appointed on February 12th, 1876. Actions for the conversion or detention of personal property must be brought within six years (Code, § 3228,) and the exclusive possession of personal property for more than six years under claim of ownership bars an action to recover it.—*Strange v. Graham*, 56 Ala. 614. The bill shows that the stock was transferred on the books of the insurance company on April 27, 1867, and the legal title to it transferred to James McDermott, and was so held by him for nearly ten years, the bill having been filed in 1877. It appears that there was a possession hostile to the title asserted by the complainant for a period which would bar a corresponding legal remedy, and hence the principle laid down in *Shorter v. Smith*, 56 Ala. 208, is directly applicable; and the statute (Code, § 3331,) makes the same statutes of limitation which are applicable to suits at law apply to bills in equity.—*Coyle v. Wilkins*, 57 Ala. 108; *Cleveland v. Williamson*, *Ib.* 402. The amendment was properly refused, for it was proposed after final decree.—Code, § 3790; *Smith v. Coleman*, 59 Ala. 260. When the statute of limitations has commenced to run it runs over all mesne acts, such as infancy, &c. 3 John. Ch. 136; 6 *Ib.* 37. The statute runs against constructive trusts.—31 Ala. 115. The refusal of the amendment, if error, was without injury, for the title of the personal representative to the personalty is exclusive, (18 Ala. 9;

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16 Ala. 694—and if the receiver stands in the attitude of the personal representative this would make no difference, for when the trustee is barred the *cestui que trust* is barred also. *Strange v. Graham*, 56 Ala. 614.

BRICKELL, C. J.—The questions presented for our consideration are, whether the demurrer to the original bill was properly sustained, and whether the court erred in the refusal of leave to amend the bill as proposed. The particular wrong of which complaint is made, and of which redress is sought, is the conversion of the shares of stock of the intestate, Edward McDermott, in the Mobile Fire Department Insurance Company. It is unimportant whether the conversion is regarded as having occurred on the 27th of April, 1876, when James McDermott had the stock transferred into his own name, and surrendered the original certificate issued to the intestate, or in November, 1870, when James transferred to McMahan, more than six years having intervened from either period before this bill was filed. The statute of limitations, obligatory alike on courts of equity, and courts of law, declares that actions to “recover for the detention or conversion of personal property, must be commenced within six years from the time when the cause of action accrued.” Code of 1876, § 3236. And when the suit is in equity, if, on the face of the bill, it appears that a longer period than that prescribed by the statute has intervened before its filing, the defendant may avail himself of the bar of the statute by demurrer, unless by proper averments it is shown that there is sufficient cause for excepting the case from the bar.—1 Brick. Dig. §§ 859–60.

The present case, it is argued, is withdrawn from the operation of the statute because it appears on the face of the bill, that until the appointment of the appellant as receiver, there was no one having the right and capacity to sue for the conversion of the stock. The general principle is, undoubtedly, as stated by the counsel for the appellant, that laches cannot be imputed—that the statute will not run where there is no one having the right and capacity to sue, or where there is no one capable of being sued.—2 Brick. Dig. 220, § 35. The principle must, however, be accepted with this explanation and qualification: that if the statute once commences running, it does not cease running, because of an intervening disability of suit. It is averred in the original and amended bills, that McGuire was appointed special administrator of the estate of Edward McDermott. The time of the appointment is not averred, nor is the time of its expiration, by reason of McGuire's death. The appellant can derive no



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benefit from the omission of these averments. The intendments and presumptions are, that he has stated his case as strongly as the facts will justify, and that the averment, of the time and duration of McGuire's appointment, would not have aided him, or it would have been stated. Under the statute a special administrator has large authority, and corresponding duty. It is his duty to collect and preserve the goods and chattels, rights and credits of the deceased, and for this purpose he can, as administrator, maintain suits. Code of 1876, § 2359. All suits instituted, or judgments obtained by him, are capable of being revived in the name of the administrator-in-chief when he is appointed. His capacity of suit in relation to the personal assets, is as large as that of the administrator-in-chief. For the conversion of this stock, McGuire had full capacity to sue, if his authority was existing when the conversion occurred. The existence of the authority at the time of the conversion must be intended, because the intendment is consistent with the averments of the bill, and the presumption is, that if the fact were otherwise, it would have been averred. No intendments can be made in favor of a pleader, which do not naturally and logically result from the facts stated in the pleading. True, it is averred that the grant of administration to McGuire, was for the sole and limited purpose of enabling him to prosecute a suit pending in the name of the intestate at the time of his death. This may have been the purpose of the party procuring the application to be made, and it may have been that the court of probate acted on the hypothesis that the revivor and prosecution of that suit, was the necessity for the grant of a temporary, limited administration, instead of the grant of a general, full administration. The statute intervened, and clothed McGuire with the legal title to all the personal assets, and with the authority to collect, preserve, and if necessary, to sue for them, whatever may have been the purposes of the grant of administration to him, or the necessity for it upon which the court acted. There was, then, a party capable of suing for the conversion of this stock, and the statute of limitations was running while he had that capacity. The termination of the administration, and its continued vacancy, by reason of McGuire's death, did not arrest or impede the operation of the statute. Upon this point the authorities speak an unvarying language. *Reed v. Minell*, 30 Ala. 61.

We do not enter on the inquiry, whether the proposed amendment was not too late, coming after the rendition of final decree, sustaining the demurrer to, and dismissing the original bill. In no event should it have been allowed, if by

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proper averments, it did not withdraw the case from the bar of the statute of limitations. The gravamen of the amendment was, the minority of some, and the ignorance of all the distributees of Edward McDermott, who had been instrumental in procuring the appointment of appellant as receiver, of the fact of the intestate's ownership of the stock, and of the fact of its conversion, until within a brief period before the filing of the original bill. There is no proper averment that the ignorance was superinduced by fraud, or by more than the mere passiveness of the respondents. Ignorance of right in the party complaining, there being no more than passiveness, mere silence, on the part of his adversary, cannot be engrafted as an exception on the statute of limitations, without a destruction of its wise policy, and without an encouragement of mere negligence.—*Reed v. Minell, supra; Martin v. Br. Bank of Decatur*, 31 Ala. 115. There is no fact stated in the original, or amended bill, which does not indicate clearly, that if the parties in interest had been as active and diligent before six years had elapsed from the wrongs of which complaint is made, as they were subsequently, they could not have ascertained their rights, and the wrongs done them. If from the lapse of time they sustain loss, the immediate cause of the loss is their own inactivity, and it is not the inactive, the negligent, the law protects. If the amendment of the original bill had been allowed it would have been subject to demurrer as was the original bill, and of consequence the appellant suffered no injury from its disallowance.

Affirmed.

## Donovan v. Haynie, Adm'r.

*Bill in Equity by Cestui que trust to compel trustee to account.*

1. *Fiduciary debt; husband's liability to account as trustee, is.*—The liability of the husband as trustee of the wife's equitable separate estate, under an ante-nuptial contract to account to the personal representative of the deceased wife for trust moneys received and unaccounted for at the death of the wife, is a fiduciary debt and is not affected by his discharge in bankruptcy.

2. *Administrator of deceased wife may maintain bill for account against husband as trustee.*—The administrator of the deceased wife may maintain a bill in equity against the surviving husband, as trustee of her equitable separate estate, under an ante-nuptial contract to compel an account and settlement of the trust estate.

3. *Admission by husband of receipt of money of wife, sufficient to charge him.*

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In the husband's answer to such a bill, his admission of the receipt of moneys belonging to the wife's estate is sufficient to charge him with the receipt of such moneys as trustee, and if he received it as a gift or loan the *onus* of proving that fact is on him.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

This was a bill filed by John D. Haynie, as administrator of the estate of Mrs. Winifred Haynie, against her surviving husband, Isaac Donovan. It is averred in the bill, that before the marriage of Mr. and Mrs. Donovan, they entered into a marriage contract, a copy of which is attached as an exhibit to the bill. In this settlement it is provided that said "Isaac Donovan, for himself, &c., does agree upon said marriage, &c., that he does and shall renounce all claim, right and title in his own right forever, in or to any property and all property, money, &c., of her, the said Winifred, the said marriage to the contrary notwithstanding; "and declares himself and all who may claim under him estopped from all claim thereto, or any part thereof, in his own right, or to any rent, issues or profits to arise therefrom. It is further provided therein, that "said intended husband shall be the trustee of his said wife, and as such shall have the title and property of his said wife, &c.; and as such trustee to manage and control the same, &c. It also provides that Mrs. Donovan shall have full power to sell and dispose of any or all of said property, and her action as to the same shall be binding on her trustee, giving her "as full and free control of said property as if she were unmarried," and declares that the husband shall not have any personal right or interest in the property except as her trustee; and at the determination of the coverture all the trust power shall cease. The bill then alleges that the husband, as trustee of his wife, came into possession of all her property; that at the time of the death of said Winifred the said Isaac Donovan had in his possession a considerable amount of money belonging to his said wife, which was part of the trust estate conveyed by the marriage contract; stating the amount to be about twelve hundred dollars; that the defendant took no beneficial interest in the property of his wife Winifred, and that after her death he became accountable to her administrator therefor; that since the death of his wife, Donovan had been adjudged a bankrupt, but that the debt due by him as trustee as aforesaid was not affected thereby. The bill prays that said Donovan may be compelled to show what property of his wife he received as trustee, and what he had on hand at the time of her death; that he be required to deliver to complainant, as administrator, all the property that went into his



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hands as trustee, and that he be required to account for all moneys, &c., belonging to or growing out of said trust estate. The defendant demurred to the bill because —1. the liability is a debt which was barred by the bankruptcy : 2. the bill fails to show that the relation of trustee and *cestui que trust* existed at the time the bill was filed, in such a way as to give the court jurisdiction to compel a discovery and an accounting.

The defendant also answered, denying that he came into possession of any of his wife's property as trustee, but stating that when he collected any money for her he immediately accounted to her for it. His answer denied that he ever entered on the duties of the trust and became liable to account for the trust property ; that he had no money in his possession at the time of his wife's death which belonged to her estate. The answer admits that not long before Mrs. Donovan's death, "having need to use some money in the management of his farm, which embraced the homestead, he made application to his wife for some money, who, being informed of the uses and purposes thereof, drew and signed checks for him payable to himself and delivered the same to him with the express understanding that he should draw the money from the bank and apply it as indicated, or as he might have need of the same in his business, and that the said sum aggregated \$1200 ; that it was a debt due from himself to his wife. Defendant pleaded that he had been discharged in bankruptcy. The cause was submitted on the bill, the demurrer and answer of the defendant, and an agreement admitting the fact that the defendant had been duly discharged in bankruptcy. The court overruled the demurrers, and decreed that the defendant be required to account for the sum of twelve hundred dollars received by him as shown in his answer. This decree is assigned as error.

GAYLORD B. CLARK, and FRANK B. CLARK, Jr., for appellant. Appellant ceased to be a trustee of his wife's property at her death.—*Smyley v. Reese*, 53 Ala. 89. The relation thereafter was simply that of debtor and creditor. The wife may deal with her equitable separate estate as if she were a *feme sole*, unless she is restrained by the instrument creating it. *Short v. Battle*, 52 Ala. 456 ; *Robinson v. O'Neal*, 56 Ala. 54 ; 50 Ala. 182. A *feme covert*, having a separate estate under an ante-nuptial contract, may enter into a contract with her husband that he shall have the land.—*Booker v. Booker*, 32 Ala., and this may be done by parol.—*Wallis v. Lane*, 16 Ala. 733 ; 2 Story's Equity, §§ 1378, 1380, 1390 ; *Gardner v. Gardner*, 3 Paige, 116 ; *Jacques v. M. E. Church*, 11 John. 248. A

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contract between husband and wife which is good at law will generally be sustained in equity.—10 Peters, 583 ; Schouler on Dom. Rel. 286. Appellant did not take possession of his wife's property as trustee. The money he received was for himself, and not for her, and was either a gift or a loan. The wife had a right to make a loan or a gift to her husband, and her check was either the one or the other. There was no fiduciary relation as to the \$1200 received by the husband, for it was used in a particular way by the husband, with the approval of the wife. There was no fraud, and no creation of any debt while acting in a fiduciary character, and the debt, if there ever was one, was barred by the discharge in bankruptcy.—*Thoms v. Thoms*, 45 Miss. 263 ; *Neal v. Clark*, 3 Otto, 704. The receipt and expenditure of the money by Donovan was not in any fiduciary character, and the burden of proving the debt to have been of a fiduciary character is on the creditor.—*Sherwood v. Mitchell*, 4 Denio, 435.

JOHN T. TAYLOR, for appellee.—All the property of Mrs. Donovan vested in her husband as her trustee immediately on her marriage. As soon as he came into possession of any of it there was a trust fastened on it at once, and the particular way or manner in which he received it can make no difference ; nor was it shown that there was any agreement between himself and his wife by which the character of his holding was changed. The debt was therefore of a fiduciary character, and was not affected by his bankruptcy.

STONE, J.—The ante-nuptial deed of marriage settlement entered into, by and between appellant and appellee's intestate, is made an exhibit to the bill. It, in express terms, makes Donovan trustee of his future wife's estate, reserves to the latter an equitable separate estate, with unlimited ownership, and very large powers in and over the estate itself, and its income. There can be no question that if any of this trust estate went into the hands of the husband under this deed, and remained unaccounted for at Mrs. Donovan's death, it created a debt of a fiduciary character, which was not discharged by the proceedings in bankruptcy.—Rev. Stat. U. S. section 5117 ; Bump on Bankruptcy, 9th ed. 730 ; Blumenstiel's Bankruptcy, 540-1.

The answer of the defendant admits the receipt of twelve hundred dollars of the equitable separate estate of the wife. Being her trustee, the *prima facie* intendment is that he received it in that capacity ; and the *onus* is on the defendant to overturn that intendment. His only reliance to obtain this end is his sworn answer. His admitted receipt of the

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money is responsive to the allegation of the bill, and is legal evidence for the defendant. The special facts he sets up to show he did not receive the money as trustee, but as a loan or accommodation, are not responsive, but are of the nature of confession and avoidance, the proof of which rested on him. These alleged facts the answer does not prove. Offering no other evidence, the defendant stands charged as a trustee, with the moneys thus received.—1 Brick. Dig. 738, sec. 1467; *Dunn v. Dunn*, 8 Ala. 784; *Walker v. Miller*, 11 Ala. 1067; *Royall v. McKenzie*, 25 Ala. 363; *Rembert v. Brown*, 17 Ala. 667.

The present bill is filed by the administrator of the *cestui que trust*, to compel the trustee to account. As we have shown above, the trustee received moneys of the trust estate, and there has been no settlement of his accounts. The bill contains equity, and the demurrer to it was rightly overruled. *Crompton v. Vasser*, 19 Ala. 259; *Vincent v. Rogers*, 30 Ala. 471; *S. C.* 33 Ala. 224; *Eldrige v. Turner*, 11 Ala. 1049; *Chapman v. Chapman*, 32 Ala. 106.

Affirmed.

## Marler v. The State of Alabama.

### *Indictment for Murder.*

1. *Severance; worked by the insanity of one defendant and the separate arraignment of the other.*—When two persons are jointly indicted, and one of them has been adjudged insane on a separate trial of that issue, and ordered to be confined in the insane hospital and his trial postponed until he becomes sane, and the other is subsequently arraigned and tried alone, there is a severance of the cases of the two defendants.

2. *Same; defendants competent witnesses after.*—Where two are jointly indicted and there is a severance, either of the defendants is a competent witness for or against the other.

3. *Insanity; not proved against defendant by special proceedings adjudging co-defendant insane.*—The record of the proceedings in the separate trial under the statute (Code, § 1488), in which one of two defendants who are jointly indicted, is adjudged insane, are not evidence against his co-defendant, of the fact of such insanity, on a trial under the indictment.

4. *Witness becoming insane; his testimony on a former trial admissible.*—When a witness was examined on the preliminary investigation before a committing magistrate, and becomes insane before a trial of the accused, under indictment for the same offense, the testimony of such witness, as given before the magistrate, is admissible in evidence on the second trial.

5. *Same; may be proved by secondary evidence.*—When the testimony of such witness was not reduced to writing on the preliminary trial before the committing magistrate, secondary evidence of what he testified to, is admissible.

6. *Same; only necessary to state substance of testimony.*—The precise words



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of such witness need not be repeated on the second trial, but only the substance of his testimony.

7. *Accomplice; what necessary to authorize conviction for felony on evidence of.* To authorize a conviction for felony on the testimony of an accomplice, his testimony need not be corroborated in every material particular, but it must be corroborated by evidence, tending to connect the defendant with the commission of the offense, and it is not sufficient if only so confirmed, as to convince the jury of its truth.

8. *Conspiracy to commit crime; how proved.*—Conspiracies to commit crime may be proved by circumstantial, as well as by direct evidence; and no positive agreement for such purpose need be shown.

9. *Same; may be proven by evidence of accomplice; when.*—Such a conspiracy may be proven by the testimony of an accomplice, if it be sufficiently corroborated, as to his statement connecting the defendant with the commission of the offense.

10. *Motive; evidence admissible to show.*—When defendant had begun suit against his wife for divorce, and his complicity in the killing arose from a desire to get rid of deceased, an important witness for the wife, as an obstacle to his success, statements made by him to a witness, that “he was tired of his wife, and intended to get a divorce from her,” and requesting permission to marry the daughter of the witness, are competent to show motive and were properly admitted in evidence.

11. *Same; proof of in this case.*—In such a case the jury could not consider the merits of the divorce suit, but only the fact of its pendency and the motive of its prosecution.

12. *Threats against deceased made by accomplice; when admissible.*—Where an accomplice testified that he killed the deceased at the instigation of the defendant, evidence of threats made by such accomplice against the deceased, because the latter was talking about his sister, tend to show that the slayer acted from personal malice without reference to the defendant, and is admissible.

13. *A charge invading province of jury properly refused.*—A charge which assumes the right of the court to direct the jury, that they “must” look to certain facts, as evidence, to influence their verdict, invades the province of the jury, and is properly refused.

### APPEAL from Crenshaw Circuit Court.

Tried before Hon. J. K. HENRY.

At the Spring term, 1879, of the Circuit Court of Crenshaw county, James Thomas Marler, and Andrew Napoleon (*alias* “Bose”) Redman, were indicted for the murder of William B. Colquitt. Before the trial of the case, Redman was pronounced insane, by a jury empaneled by the order of the court, to try the question of his sanity, and the court adjudged him insane, and ordered him confined in jail until he could be sent to the State Insane Hospital at Tuscaloosa; that on his return to sanity, he should be remanded to the jail of Crenshaw county for trial, and that his trial be postponed until that time. Marler was arraigned and pleaded “not guilty,” and was tried alone. W. B. Colquitt, a practicing physician, having a sick patient at his house, took a lamp about eight o’clock, on the night of August 16th, 1878, to get some medicines which he kept in his medicine chest in his buggy, which was then under a shelter in his horse-lot, and while there was shot and killed by Redman, the defend-

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ant. The defendant, Marler, had filed a bill against his wife for divorce which had been answered, and on July 18th, 1878, direct interrogatories were filed, on behalf of his wife, and were propounded to Dr. Colquitt and ten or twelve other persons. Cross interrogatories were filed August 12, 1878, and a commission issued on the same day to take testimony. Marler, in a conversation with the commissioner, objected to the time and place of taking the testimony, and got him to change the place of taking it to one Davis', and the time of taking it to the Thursday or Friday after Dr. Colquitt was killed. The bill, the answer of the wife, and the interrogatories, were introduced in evidence by the State. Thomas Holmes testified, that about two weeks before Dr. Colquitt was killed, he heard Marler say that he would get a divorce from his wife; that there was but one thing in the way, and that was Dr. Colquitt, but that he would put him out of the way or have it done. On cross-examination, he was asked by the defendant, if he did not hear Dr. Colquitt a short time before his death, make remarks in a public manner, derogatory to the character of Redman's sister. The State objected to this question, the court sustained the objection and defendant excepted. Jacob Redman, the father of "Bose" Redman, testified that about two months before Dr. Colquitt was killed, defendant Marler stated to him, that he was tired of his wife, and intended to get a divorce from her, and that he wanted his, (Redman's), permission to marry his daughter, which witness told him he could not do. The defendant objected to the introduction of this evidence, but the court overruled the objection, and defendant excepted. Mr. Gilchrist testified that defendant told him that he wanted to get a divorce from his wife, and asked witness to fix up for him some deeds to land, but witness asked him to get Mr. Stallings or Dr. Colquitt to do it, and then defendant said, that Dr. Colquitt was attending to his business, and if he did not stop it he would make him do it. In another conversation, he stated to witness that "his wife was a lewd woman, and he intended to have a divorce from her." Witness said to him that "his wife was a good woman, and if he didn't mind they would get him in jail;" defendant replied that "some of them were going to swear in the case, and he would get them in jail." The original papers in the proceedings before the committing magistrate were introduced in evidence against the objection of defendant, and to the introduction of which, the defendant excepted. The magistrate testified, that Marler was tried before him separately and not with his co-defendant Redman. The State also introduced in evidence the judgment of the Circuit Court of Crenshaw county ad-

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judging said Redman to be insane, the substance of which has already been stated. The defendant objected to the introduction of the evidence, but the court overruled the objection, and defendant excepted. Redman had testified as a witness, on the preliminary trial of the defendant, Marler, before a committing magistrate, but his testimony was not reduced to writing, and the State introduced W. D. Roberts, Esq., to prove what Redman had sworn at said trial. The defendant objected to Roberts so testifying, but the court overruled the objection, and defendant excepted. The substance of Redman's testimony, as given by the witness Roberts, was that he, Redman, had killed Dr. Colquitt; that Marler had hired him to do so; that the agreement was made on Monday before the Friday on which the killing occurred; that Marler agreed to give him fifty dollars, gather his crop for him, carry him to his (Marler's) sister, and assist him with rations if he was discovered in the killing; that he stood at the gate of Dr. Colquitt's lot, who was standing by his buggy, with a lamp in his hand, and when he turned around he shot him. Marler was to take his wagon, and go to George Leverett's, so that if suspected he could prove that he was not where the killing took place; that he then went to the house of Marler's father, found the room arranged as Marler had told him it would be fixed, and awoke Catherine Marler, defendant's sister, and told her he had killed Dr. Colquitt, and she replied, "I am sorry you did it," and called her mother and informed her what he, Redman, had done; that Mrs. Marler told him to go away, and he did so; that he killed Dr. Colquitt for the love he had for Catherine Marler; that Marler said the reason he wanted Dr. Colquitt killed, was because he was going to swear his happiness and life away; that he only stayed two or three minutes at Mrs. Marler's. Defendant moved to exclude this evidence from the jury, but the court overruled the motion and defendant excepted. Catherine Marler testified that Redman came to her window, the night Dr. Colquitt was killed, had a short conversation with her, and her mother, and told her he had killed Dr. Colquitt. George Leverett, an uncle of the defendant, testified that Marler arrived at his house about 8 o'clock on the Friday evening when Dr. Colquitt was killed. Cole Redman, a brother of "Bose Redman," testified, that defendant offered him \$100, on the morning he was committed, to swear that he, Marler, and his brother, "Bose" Redman, had had a difficulty; that this was untrue, and he refused to swear it.

The defendant introduced Mrs. Marler, who testified that she went with Redman from her house to his father's on the



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Friday previous to the killing, that she returned with Redman on the next Monday; that he stopped at his house and witness went on home, where she found defendant. She was then asked why she made the trip with Redman to his father's. The State objected to this question, the court sustained the objection, and defendant excepted. She was then asked if she heard Redman say anything about Dr. Colquitt during that trip, but the State objected to the question, the court sustained the objection, and defendant excepted. She was then asked, if, on said trip, she heard Redman make any threats against said Colquitt. The State objected to the question, the court sustained the objection, and defendant excepted. The defendant announced to the court before the two preceding exceptions were reserved, that he proposed to prove by said witness, that the said Redman had threatened the life of Dr. Colquitt for talking about his sister. She also testified, that on the evening of the day she returned with Redman from his father's, Redman, his wife and her sister came to her house, and returned when the sun was about a half hour high. Defendant asked her, "what reason they gave for returning." The State objected to this question, the court sustained the objection, and defendant excepted. The court charged the jury, "that it is not necessary to authorize a conviction for felony on the testimony of an accomplice, that his evidence should be corroborated by other evidence, in every material point, but it is sufficient if it be so confirmed, as to convince the jury, that it is correct and true. The defendant excepted to the giving of this charge. The defendant then asked the court to give the following written charges to the jury; all of which the court refused to give, and the defendant separately excepted to each refusal. 1. The jury have nothing to do with the merits of the divorce suit, and the fact that the defendant failed to deny to Gilchrist that his wife was a good woman, is not a circumstance to be considered by the jury in passing upon the guilt or innocence of defendant. 2. That there can be no conspiracy to do an unlawful act, without a positive agreement between two or more parties to do such act, and that unless, outside and independent of the testimony of said "Bose Redman," the evidence shows such agreement on the part of defendant to do such act, they must acquit the defendant. 3. That if the jury have a reasonable doubt, as to whether or not, the evidence outside of the said Redman's testimony shows a community of purpose between the said Redman, and the defendant, they must acquit the defendant. 4. That if the jury have a reasonable doubt, whether the evidence outside of the testimony of said Red-

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man, shows a conspiracy, or agreement between said Redman and the defendant, to take the life of the deceased, they must acquit the defendant. 5. The jury have nothing to do with the declaration of the defendant, that he was tired of his wife, except in so far as it may tend to show that he wanted a divorce. 6. They must also look to the fact, if it be true, that he is contradicted as to some of the material facts contained in his statement, and that there is a want of corroboration as to some others, if such want of corroboration in fact exist, and the evidence of such corroboration is reasonably attainable. 7. The jury need not necessarily infer that defendant is guilty, although he may have offered Cole Redman \$100 to swear falsely, if they believe that he was influenced by the fear of being unjustly convicted. The defendant was convicted and sentenced to imprisonment for life.

J. D. GARDNER, for appellant.—The court erred in admitting the evidence of Roberts, as to what Redman swore on, the preliminary examination. Such testimony is inadmissible except where the witness is dead.—*Dupree v. The State*, 33 Ala. 380; *Tharp v. The State*, 15 Ala. 749, citing 5 Ran. 701, 5 Hill (N. Y.) 295. But Redman being jointly indicted with appellant was disqualified as a witness. The testimony of Redman's father was irrelevant and ought to have been excluded. The defense should have been permitted to prove the threats made by Redman against Colquitt. The testimony which convicted defendant was purely circumstantial. Many other questions are presented, but not argued, as it is thought unnecessary.

H. C. TOMPKINS, Attorney-General, for the State.—The evidence of Jacob Redman was admissible to show the motive for killing Dr. Colquitt. Appellant had filed a bill seeking a divorce from his wife, and testimony which would show that he wished to marry another woman, would be the strongest kind of evidence, to prove a desire to get rid of his wife. Any proof tending to show this desire was admissible and would tend to show a reason for appellant's antagonism to Dr. Colquitt, whose testimony and exertions seem to have been an insuperable obstacle in his way. Proof of a desire to get rid of his wife was certainly admissible, and the fact that he wished to do so to marry another woman, is even stronger evidence, for if he had simply desired to get rid of an unworthy wife, the efforts of her friends to prevent him from doing so, would not in all probability have excited in him that malicious feeling which prompts murder; but if the

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desire to get rid of his wife originated in those lustful passions, which are against the law of God and man, the jury might infer that the same yielding to criminal passion had planned the assassination of Dr. Colquitt, especially when yielding to one seemed to furnish the means of gratifying the other. The judgment of the court pronouncing Redman insane, and the subsequent arraignment and trial of defendant worked a severance of their cases, and Redman was a competent witness against Marler.—1 Wh. Am. Cr. Law, 783. When a witness who has testified on a former trial has died, become insane, or physically disabled, his former testimony may be proven on a subsequent trial, in criminal, as well as in civil cases.—2 G. & J. 54; 6 C. & P. 116; 4 Eng. C. L. 145; *Id.* 147; 1 Wh. on Ev. 179; 17 Ala. 354; 1 Gr. on Ev. 163; 1 Starkie on Ev. 262. Roberts' evidence was sufficiently full.—17 Ala. 354; 17 Vt. 658; 10 Humph. 479. The other exceptions to evidence do not present questions which will authorize this court to reverse.—47 Ala. 370; 63 Ala. 178. The charge of the court was most favorable to the defendant, in requiring the jury to believe that all of Redman's testimony was true, which was unnecessary. It is only necessary that the testimony of an accomplice should be corroborated by evidence tending to connect defendant with the commission of the offense.—Code of 1876, § 4395; 40 Ala. 634. These authorities show the incorrectness of the third and fourth charges. The second charge was wrong in requiring proof of a positive agreement of conspiracy. 1 Brick. Dig. p. 451, § 53. The 6th charge is meaningless. The 7th charge would have required explanation. It was the duty of the jury to look at the whole evidence, and the remark referred to in the first charge, was part of a conversation and could not be withdrawn from them.

SOMERVILLE, J.—The main question presented for our consideration in this case, is the admissibility of the witness Roberts' testimony as to what one Redman had previously sworn on the preliminary investigation before the committing magistrate. Redman had there testified for the State, under the sanction of an oath, subject to a full cross-examination by the defendant. Before the trial in the Circuit Court, in which he was jointly indicted with the appellant, Marler, he became insane, and was so pronounced by the verdict of a jury and the judgment of the court, after which a severance of the case was granted. The court admitted the substance of Redman's testimony, as given before the magistrate, to be proved, to which an exception was taken, and this ruling of the Circuit Judge is assigned as error.



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The general rules of evidence at common law, subject to few exceptions, are the same in civil and criminal cases, being more liberal, at least in some instances, in the latter than the former. Dying declarations, for example, are never admissible in civil cases, but only in charges of homicide. It is manifest, indeed, that the danger of perjury is not usually so great in matters of crime, which government and society are chiefly interested in punishing, as in those cases involving large pecuniary interests, as the experience of mankind has taught in all countries where nuncupative wills have been allowed.—2 Best Ev. § 505.

It is now established beyond disputation that, where a witness has testified under oath, in a judicial proceeding, in which an adverse litigant was a party, and was subject to cross-examination, the testimony so given is admissible, after the *decease* of the witness, in any subsequent suit between the same parties.—1 Greenl. Ev. 163; 2 Best Ev. § 496; 1 Phil. Ev. (C. H. & E.) 389, *note*; 2 Russ. Cr. 683. And in *Horton v. State*, 53 Ala. 488, this principle was declared “applicable alike to civil and criminal cases,” and this court, on the strength of it, sustained the admission of the testimony of a deceased witness, taken down by a committing magistrate on preliminary investigation, when introduced on trial under indictment in the Circuit-Court.

Such testimony is not liable to the objections ordinarily urged against hearsay or derivative evidence, for it was delivered under the sanction of an oath, and the adverse party has had, or might have had, the full benefit of a cross-examination.—1 Stark. Ev. 42. It is, therefore, admitted rather upon the principle of necessity, than of expediency, so as to prevent the defeat of the ends of justice. “The admission of such evidence,” says Mr. Wharton, “is based upon the fact that the party against whom the evidence is offered, having had the power to cross-examine at the former trial, and the parties and issues being the same, the second suit is virtually a continuation of the first.”—Law of Ev. § 177.

We are of opinion that the reason of the rule applies, with unanswerable force, to all cases where the witness has become *insane*. As said by Lord Kenyon, in *Rex v. Eriswell*, 2 Durnf. & E. 386 (3 T. R. 707), he is, to all intents and purposes, to be considered “in the same state as if he were dead.” And though the question was left undecided in that case, Buller, J., concurring with Lord Kenyon, regarded the party “as dead, he being in such a state as to render it impossible to examine him.”—*Ib.* 391.

A case, however, clearly in point is that of *Regina v. Marshall*, Car. & Mar. Rep. 147. It was there held that where a

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witness was *actually* insane at the time of the trial on indictment, his deposition, taken before the committing magistrate, could be read the same as if he were *dead*, although the insanity be but temporary; but not where the witness was suffering from delirium through injuries produced by a blow on the head, if his physician was of opinion he would recover. In *Rex v. Hogg*, 6 Car. & P. 176, where a prosecutor, in a case of felony, was bed-ridden, and there was no probability that she would ever be able to leave her home, her deposition taken before the magistrate was held admissible in the same manner as if she were dead. In the Earl of Strafford's case it was adjudged, "that where witnesses could not be procured to testify *viva voce*, by reason of sickness, &c., then their depositions might be read, for or against the prisoner, but not when they might have been produced in person."—2 Hawk. Pl. Cr. ch. 46, s. 20.

There seems to be no difference of opinion on this question among the best text-writers. Mr. Greenleaf asserts that such evidence is admissible, "if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is *insane*, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party." Mr. Wharton takes the same view, thinking the rule applies "when, from the nature of the illness or infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion," and he adds: "*Mental incapacity*, from whatever cause, is a sufficient inducement. It has been said, that if the insanity is temporary, the true course is to continue the case until the witness recovers; but the contrary view has been expressed by an English court, and there are some classes of cases (*e. g.* criminal of high grade) in which such a continuance cannot in law be granted, and others in which the inconveniences would be so great as to amount to an obstruction of justice."

The annotator of Phillips on Evidence approves the application of the principle in question to cases where the witness has become insane, and others of like character, and arrives at the conclusion that "those [cases] which have come nearest to the liberal principle on which secondary evidence is generally received, are less anomalous, and therefore more scientific than the narrower decisions."—1 Phil. Ev. (C. & H. and E.'s notes), 393.

Mr. Justice Cheves, in *Drayton v. Wells*, 1 Nott and McCord, 409, says: "The books enumerate four cases only in which the testimony of a witness, who has been examined in a former trial, between the same parties, and where the point in issue is the same, may be given in evidence, on a second

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trial, from the mouths of other witnesses, who heard him give evidence : 1st. When the witness is *dead* ; 2nd. Where he is *insane* ; 3rd. Where he is beyond seas ; 4th. Where the court was satisfied that the *witness had been kept away* by the contrivance of the opposite party."

In *Ernig v. Diehl*, 76 Penn. St. 359, the rule as enunciated by Mr. Greenleaf is endorsed by Sharswood, J., and was applied to one in such a state of *senility* as to have lost his memory, all of the seven judges concurring on this particular point.

In *Rogers v. Raborg*, 2 Gill and J. 54, the Supreme Court of Maryland admitted the deposition of a *paralytic*, who, though regularly summoned as a witness, was unable to leave his home, or speak so as to be understood. The court declared the evidence admissible on the ground of necessity, the witness being the same as if he were dead.

The courts of Louisiana have gone so far as to admit such testimony in the case of the *temporary sickness* of a witness. In *Miller v. Russell*, 7 Mart. Rep. 266, where a witness had been examined and notes of his testimony carefully taken, the court said : "To have examined him again, laboring under disease, would have afforded no better evidence, perhaps not so clear, as that which had been obtained from him on the former trial." But as Lord Ellenborough suggested in *Harrison v. Blades*, 3 Camp. 458, in such cases, it should appear that the sickness is of a character imposing permanent inability, as, otherwise, there would be very many sudden indispositions and recoveries.

In *Kendrick v. State*, 10 Hump. 479, the Supreme Court of Tennessee indorsed the principle admitting the testimony of a deceased witness given in a former trial, and declared the maintenance of the rule, in criminal cases, to be of far greater importance to the lives and liberty of defendants than of mere justice to the State.

This court, in *Long v. Davis*, 18 Ala. 301, admitted the deposition of a witness, taken in a former suit, after his *removal from the State*, in a subsequent suit between the parties. CHILTON, J. said : "We think the more liberal doctrine which allows a permanent absence from the jurisdiction as an excuse, is more consonant with the legal analogies, and is sustained by the preponderance of authority."

It has been held by some of the courts, including those of New York and Virginia, that no evidence of this character, save that only of *deceased* witnesses, is admissible in criminal cases, but this view, we believe, is opposed to both the weight of reason and the preponderance of authority. Whether originating in necessity or based on expediency, the purpose



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of the rule is to prevent the defeat of justice ; and tested by this principle, there is no real or practical difference between the *death of the mind* and the death of the body. If a man's reason be utterly dethroned, it were all one, in the eye of the law, so far as regards his capacity to testify, that his body were in the grave.

It is very clear that such evidence is no more a violation of the constitutional right of every citizen to be confronted by his witnesses, than the admission of dying declarations, and in fact, much less so, as the defendant has once exercised this right, and had an opportunity to elicit the truth by cross-examination.—*Kendrick v. State*, 10 Hump. 479 ; *Com. v. Richards*, 18 Pick. R. 437 ; *Green v. State*, M. S. Dec. T. 1880.

And while some of the cases follow the old rule first suggested, we believe, by a *dictum* of Lord Kenyon (4 T. R. 290), that the very language of the witness—*ipsissimis verbis*—must be given, the well settled opinion now obtains that the precise words need not be repeated on the second trial, but only the substance of the testimony given in the former trial. 1 Greenl. § 165 ; Wharton Am. Cr. L. § 667 ; *State v. Hook*, 17 Vt. 659 ; *Kendrick v. State*, 10 Hump. 479.

The rulings of the Circuit Court were without error in admitting the secondary testimony, given by Roberts, as to what Redman had testified before the committing magistrate.

The record proceedings establishing the insanity of Redman were designed under the statute to be *pro hac vice* merely. They were improperly admitted in evidence in this case, as defendant was no party to them, nor in any manner bound by them. They were entirely unlike an ordinary inquisition of lunacy, which is analagous to a proceeding *in rem*. being made on behalf of the public, so that no one can strictly be said to be a stranger to it.—1 Greenl. Ev. 556 ; Code (1876), § 1488. The insanity of Redman could be proved by any competent evidence satisfactory to the mind of the court.

The action of the Circuit Court created a severance in the cases of the two defendants, who were jointly indicted, and either was then a competent witness for or against the other. Code, (1876), § 4892 ; Clark's Man. Cr. L. § 2402 ; Whart. Cr. Ev. § 439.

There was no error in excluding the question propounded to the witness Holmes, whether he had not heard deceased make remarks derogatory to the character of Redman's sister. It was clearly irrelevant, unless shown to have been communicated to Redman, as a motive to the homicide other than the one upon which the theory of the prosecution was based. Nor is it made to appear what was the pertinency of the interrogatory propounded to Mrs. Marler, asking " what

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reason" Redman, and his wife and sister, gave for returning from his father's.

The Circuit Court erred, however, in giving the charge to which exception was taken. In order to authorize the conviction of a defendant for felony on the testimony of an accomplice, it is true that his testimony need not be corroborated in every particular. But it is not sufficient if it merely be so confirmed as to convince the jury it is true. It must be "corroborated by other evidence tending to connect the defendant with the commission of the offense." The statute does not permit a jury to be convinced by any other kind of corroboration.—Code (1876), § 4895; *Smith v. State*, 59 Ala. 104.

It was error, also, to exclude the evidence that Redman had made threats against the deceased for talking about his sister. This would tend to prove that his conduct in killing deceased was dictated by his own personal malice, independently of the instigation of the appellant, Marler, and to this extent suggested a possible hypothesis inconsistent with his own statement.

The first charge requested by the appellant, and refused by the court, should have been given. The jury had no right to consider the merits of the divorce suit, but only the fact of its pendency and the motive of its prosecution. Nor did defendant's failure to deny to Gilchrist that "his wife was a good woman" affect the question of his guilt or innocence.

A conspiracy to commit a crime can be established as well by circumstantial as by direct evidence. It is not necessary to prove a "positive agreement," as asserted by the second charge, nor to establish it "outside and independent" of the testimony of an accomplice. If the testimony of the accomplice is satisfactorily corroborated so far as his statement connects the defendant with the commission of the offense, it is a sufficient conformity to the statute. The second, third and fourth charges were properly refused.

The State was permitted to prove by Jacob Redman, against objection, the fact that the prisoner, Marler, stated to him that "he was tired of his wife, and intended to get a divorce from her, and he [Marler] wanted his [Redman's] permission to marry his daughter." This was competent, we think, to prove motive. The deceased, Dr. Colquitt, was an important witness in the divorce suit instituted by Marler against his wife. The evidence tended to show that Marler's imputed purpose, in his alleged complicity in the killing, was to get rid of deceased as an obstacle to his success in obtaining such divorce. This motive, if in fact it existed, was material to strengthen the probability of his guilt. If he

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wished to marry Redman's daughter, this might intensify the desire for a divorce, and this again tend to quicken eagerness to destroy the witness. For this reason the evidence in question was admissible, and the fifth charge requested by appellant was properly refused.

The sixth charge invaded the province of the jury, in assuming the right of the court to charge the jury that they "must" look to certain facts, as evidence to influence their verdict; and the seventh was not supported by the evidence, and being abstract, it was not error to refuse it.

There are several other minor exceptions to the admission of evidence, not necessary to be noticed, as they are not likely to arise again in a new trial.

The judgment of the Circuit Court is reversed and the case remanded. And, in the mean while, let the prisoner be retained in custody until discharged by due course of law.

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### *Indictment for Murder.*

1. *Dying declarations, made in answer to questions; admissible.*—On the trial of one charged with murder, a declaration made by deceased as to the cause and circumstances of his death, while under conviction of impending dissolution, although part of it was in reply to questions asked him, is admissible.

2. *Cross-examination, conduct of, largely in the discretion of the court.*—There is no uniform rule governing the cross-examination of witnesses, but it rests largely in the discretion of the court, greater liberty being permissible when the witness shows partisanship, than when he evinces impartiality; and it must be a strong case to justify a reversal for too great latitude allowed in such examination.

3. *Character; what to be considered in estimating.*—The shadings, as well as the brighter hues, are to be considered in making up the estimate of character and reputation; and, when a witness had testified that he knew the character of the accused for peace and quietude, and that it was good, it is not error to allow him to be asked, on cross-examination, if he had not been informed that the defendant had "killed a man in the State of Georgia," and his answer was admissible in evidence.

4. *Self-defense; doctrine as to, stated.*—A charge which asserts that the necessity of self-defense, which justifies the taking of human life, must be present, imperious, and impending, or so appear to the defendant, is free from error.

5. *Same; what necessary to make out justifiable homicide in self-defense.* Charges which declare that, "to make out a case of justifiable homicide committed in self-defense," the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time, as to create a reasonable apprehension of danger to his life, or grievous bodily harm, and that there was no other reasonable mode of escape from such impending evil, are proper.



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6. *Same; charge which ignores duty of escaping from difficulty, in establishing; erroneous.*—On a trial for murder, when the accused relies on self-defense to justify the killing, charges which assert the right of the defendant to kill the deceased, if it reasonably appeared to him that the deceased intended to take his life, or inflict on him great bodily harm, but which ignore the fact, or principle, that, to establish this defense, there must have been no other safe mode of escape open to defendant, are properly refused.

APPEAL from Talladega Circuit Court.

Tried before Hon. L. F. Box.

Thomas Ingram, the appellant, was indicted at the spring term, 1877, of the Circuit Court of Talladega county, for the murder of Jack Coleman. On the trial the only eye-witness of the homicide, D. D. McDonald, testified that in the afternoon of October 19, 1876, about a half hour before sundown, he was going from his shop in Childersburg, Ala., to Sheely's store, and while walking across the open square, he saw Thomas Ingram, a white man, and Jack Coleman, a colored man, walking side by side, across the square. They crossed his path about ten steps in front of him, going in the direction of Green's store, which was in the south-eastern part of the square, and were engaged in conversation. Coleman was talking in an excited manner, but the witness could not hear what they said until immediately after they crossed his path, then he heard Ingram say to Coleman, "do not cut me with that knife." At this moment they "halted, made a half wheel, and stood face to face," and, as they were turning, Ingram, who had a shot gun on his shoulder, said to Coleman, "if you cut me, or try to cut me, I will shoot you." Witness then looked at Coleman, and saw that his hands were downward, his left hand by his side, and an open knife, with a blade about three inches long, in his right hand. Ingram and Coleman were as near to each other as they could stand, witness being about ten paces away. Coleman had the open knife in his right hand, which was downward, and drawn backward in striking position, far enough for witness to see the full length of the knife-blade. As Ingram said "do not cut me," he stepped slightly backward, took his gun off his shoulder, held the muzzle of it close to Coleman's breast and fired, the shot taking effect on the left side of his breast, and he fell immediately, and died about a week afterwards. The gun which Ingram used belonged to J. B. Green, to whose store Ingram went immediately after the shooting, and witness went on to Sheely's store. Jos. H. Keith heard the report of the gun, and, in a minute or two afterwards, saw Coleman lying on the ground. The shot entered his left breast, above the heart, and ranged inward, upward, and backward, making a hole large enough for the witness to insert three of his fingers. Coleman said he was going to die. The State then.

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asked the witness "what Coleman said about being shot, and who shot him." The defendant objected to the witness' testifying to Coleman's declaration, the court overruled the objection, and defendant excepted. The witness then stated, that Jack Keith asked Coleman if he had drawn his knife on Ingram, and that in reply to this question, Coleman said, that he did not draw his knife on him, and that "Ingram had shot him for nothing." According to the testimony of Lewis Taylor, a few moments before Coleman was shot, he was sitting with witness and others on the steps of the verandah of a house where a justice's court had been held that day, and was whittling with his knife; that while there, Ingram came by and said he wanted to talk to Coleman, or have a word with him, and requested Coleman to go with him. They walked off together, and a few minutes afterwards witness heard the report of the gun, and went to the place it proceeded from, and found Coleman had been shot. On cross-examination, counsel proposed to show by witness, "that on the day of the shooting, immediately after the shooting, that fifteen or twenty colored men marched in procession in Childersburg, and made demonstrations of hostility." The State objected to this evidence, because the facts proposed to be proved, occurred after the shooting. The court sustained the objection. Counsel for defense stated, that the evidence was offered in connection with other evidence to be offered, that in the forenoon of the same day, fifteen or twenty colored men had marched in procession in Childersburg, and made demonstrations of hostility. The State renewed the objection to this evidence, the court sustained the objection, and defendant excepted. The evidence of J. B. Green, who was called for the defendant, showed that Ingram, who resided on witness' farm, had used the gun with which he had killed Coleman, for the purpose of guarding five colored persons, who were in custody, charged with stealing cotton; that at the time of the shooting, Ingram wore a coat which he had bought from the witness about a week before, and when, about ten minutes after the shooting, he came to witness' store and delivered the gun, there was a cut or hole in the breast of the coat; that he was acquainted with the general character of the defendant in the neighborhood of Childersburg for peace and quietude, at and before the time, and that his character was good. Counsel for the State asked the witness, on cross-examination, "if he had not been informed that defendant had killed a man in the State of Georgia." The defendant objected to this question, but the court overruled the objection, and defendant excepted.

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The witness answered, that he "had been informed that defendant had killed a man in the State of Georgia."

Joshua Oden testified that on the day of the killing, Ingram and another person had, at his request, gone with him and arrested some colored people, who were charged with stealing cotton. These people were placed in Ingram's custody as guard, by the justice before whom the charge against them was investigated; Ingram had a gun with him while acting as guard, and after the trial he came to the witness' house, and, after a few minutes conversation, started off saying that he was going to Green's store to give him his gun. In a few minutes he heard the report of the gun, and went to where it was fired and found that Coleman had been shot. The defendant proposed to prove by this witness that at the time Jack Coleman was killed, he was employed by the witness as a laborer, and that he knew no reason why he was absent from his work in Childersburg. The State objected to this evidence, the court sustained the objection, and defendant excepted.

The court charged the jury, that "the necessity of self-defense which will justify the taking of human life must be present, imperious, and impending, or so appear to the defendant; that to make out a case of justifiable homicide, committed in self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or grievous bodily harm, and that there was no other reasonable mode of escape from such impending evil."

The defendant excepted to these charges and requested the court, in writing, to charge the jury: "4. If the jury believe, from the evidence, that the deceased attacked the defendant in a violent manner, and that the defendant believed that the deceased intended to take his life, or inflict great bodily harm on him, the defendant had a right to shoot in self-defense, and if he killed the deceased in so doing, it was justifiable and self-defense. 5. It is not necessary that the appearances should be real; it is sufficient if the danger be apparent, such as to create in the mind of a reasonable man, the belief that it was necessary to take the life of the assailant, in order to save his own life, or prevent great bodily harm from being done him, and if, under such circumstances, the defendant took the life of the deceased, he is not guilty. 6. The law does not require the necessity for taking life to be one arising out of actual and imminent danger, in order to excuse the slayer, but he may act upon the belief arising from appearances, which give him reasonable cause



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for it, that the danger is imminent, and apparent, although he may turn out to be mistaken. The guilt of the accused must depend on the circumstances as they appear to him, and he will not be held responsible for a knowledge of the facts, unless his ignorance of the facts arose from fault, or negligence, and if the circumstances be such as to create in the mind of a prudent man, the belief that there was a necessity to shoot the deceased, to save his own life, or prevent great bodily harm." The court refused to give any of these charges, and the defendant separately excepted to each refusal of each charge. The defendant was convicted of manslaughter in the first degree. The action of the court in the rulings on the evidence, and the giving and refusal of the charges, are assigned as error.

JOHN T. HEFLIN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The testimony is that the load, with which the gun was charged, entered the left breast of the deceased, just above the region of the heart, inflicting a wound, into which the witness testified he could insert his three fingers. Deceased expressed the conviction he would die. We think there can be no doubt the declarations were made under a conviction of impending death.—*Faire v. The State*, 58 Ala. 74, and authorities cited. Part of the declaration of the deceased was in reply to a question asked him. This precise question has been several times before the English courts, and it was ruled that the fact that the declaration was made in reply to an inquiry did not render its admission illegal. Sharswood's *Russ. on Crimes*, 3 vol. 262-4; *Moore v. The State*, 12 Ala. 764; *McHugh v. The State*, 31 Ala. 317.

We are unable to perceive any principle which would justify the admission of evidence that "immediately after the shooting, fifteen or twenty colored men marched in procession in Childersburg, and made demonstrations of hostility." This could not possibly shed any light on the factum or intent of a transaction then passed.

Much latitude is allowed in the cross-examination of witnesses, and much must be left to the enlightened discretion of the court. No uniform, universal rule can be laid down. Much wider liberty of cross-examination is permissible, when the witness betrays partisanship, or partiality, than when he narrates the facts with prompt indifference, whether they favor the one side or the other. Hence, it must be a strong case to justify reversal, for too great latitude allowed in

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cross-examination.—1 Greenl. Ev. § 449; *Stoudenmeyer v. Williamson*, 29 Ala. 558; *In re Carmichael*, 36 Ala. 514. A witness had sworn he knew the general character of the prisoner for peace and quietude in his neighborhood, and that it was good. On cross-examination he was asked if he had not heard that the defendant had killed a man in the State of Georgia. He was allowed to answer this question against the objection and exception of defendant. In 1 Best. on Ev. § 261, is the following paragraph: "In *R. v. Wood*, (5 Jurist, 225), the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as witness said, borne a good character. On cross-examination it was proposed to ask the witness whether he had not heard that the prisoner was suspected of having committed a robbery, which had taken place in the neighborhood some years before. This was objected to as raising a collateral issue; but Parke, B., overruled the objection, saying, 'The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it.' A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." The question was allowed, and the prisoner convicted. We approve this principle and the reason given for it, and hold that the Circuit Court did not err in receiving this evidence. In estimating character, the shadings as well as the brighter hues should be considered. They all go to make up character—reputation—the estimation in which the person is held. But it is only character, and not the particulars or details of independent acts, which can be inquired into.

The presence of deceased in Childersburg on that day, away from the place he was hired to labor, was, of itself, an immaterial circumstance in this trial.

In the two charges given, the Circuit Court only followed the law as declared in many rulings of this court.—*Judge v. The State*, 58 Ala. 406; *Mitchell v. The State*, 60 Ala. 26; *Ex parte Brown*, in manuscript.

Charges numbered 4 and 5 asked, ignore entirely the question of any other safe mode of escape. Human life is not taken with impunity, if the slayer provoked the difficulty, or failed to retire from it when he could have done so without endangering his life, or exposing himself to grievous bodily harm. When the accused stepped back, so as to afford him space to level his gun, he had placed the deceased at such a disadvantage, as that any attempt at aggression by the latter could have been easily averted. It is not shown that the deceased made any movement forward, or attempted to do

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so; nor is it shown that he raised his arm from its pendent position. The only eye-witness of the homicide fails to state any thing of the kind. One having a loaded gun pointed at another, who is not advancing, can not be in present imminent peril of life or limb, even though that other have an open knife in his hand. The 6th charge asked is involved and calculated to mislead, if, indeed, it is not abstract.—*Cross v. The State*, 63 Ala. 40; *McNeezer v. The State*, *Id.*

Affirmed.

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### *Indictment for Peddling Sewing Machines without License.*

1. *Federal Constitution; construction placed on by United States Supreme Court binds all courts.*—The construction placed on the provisions of the Federal Constitution by the Supreme Court of the United States is binding on all the judicial tribunals of this country.

2. *Discrimination by State against products of other States prohibited.*—No State, either in the exercise of its taxing power, or of its police power, can discriminate in favor of its own products and manufactures, and against the products and manufactures of other States.

3. *Statute exacting license for peddling, but exempting domestic manufactures, unconstitutional.*—The statute of this State, (Code 1876, § 494, subdivision 8) which imposes a license tax on “peddlers,” the amount of the license being regulated by their manner of traveling, and which declares that, “such license shall entitle him to peddle only in the county where it is taken out, but this shall not apply to any articles produced or manufactured in this State,” discriminates in favor of the manufactures and products of this State, and against those introduced into it from other States, and is unconstitutional.

4. *Statute; when effect will be given to remainder of, when part held unconstitutional.*—When part of a statute is pronounced unconstitutional, and there are other parts or sections of it, which are not dependent upon, and which are separable from, and capable of full execution without such unconstitutional portion, their validity is not affected.

5. *Same; when whole statute fails, on account of unconstitutional part.*—But, if the parts of a statute are so materially connected and dependent as to warrant the belief that the legislature intended them as a whole, and there is no good reason for believing it was intended; that if a part should be incapable of taking effect the residue should stand, the whole statute must fail.

6. *Same; section 494, subdiv. 8, Code of 1876, entire, and incapable of separation.*—The statute imposing a license tax on peddlers (Code, § 494, sub-div. 8) is, in its purposes and objects, an entirety; and the attempted exemption of domestic manufactures from the tax, cannot be stricken out and the residue of the law preserved without imposing a tax on such manufactures, when the legislature has not done so, but has expressly relieved them from it.

WRIT OF ERROR to Jefferson Circuit Court.

Tried before Hon. W. S. MUDD.

Appellant was indicted at the fall term, 1879, of the Circuit



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Court of Jefferson county. The indictment charged him with "engaging in or carrying on the business or profession of peddling sewing machines, without first having paid for and taken out a license therefor." No errors are assigned on the record, and the written briefs of counsel, which are on file, do not discuss the constitutionality of the statute recited in the opinion of the court, but are directed to defects in the indictment, hence, it is unnecessary to give them.

HEWITT & WALKER, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The appellant was indicted for peddling sewing machines without license. The statute (Code of 1876, § 494), requires that licenses for certain occupations shall be obtained, and fixes the sum to be paid for each license. The eighth subdivision of the section reads as follows, viz.: "For peddlers in a wagon, forty dollars; for peddlers on a horse, twenty dollars; for peddlers on foot, ten dollars. A peddler's license shall entitle him to peddle only in the county where it is taken out; but this shall not apply to any articles produced or manufactured in this State, except as otherwise provided," &c. The statute manifestly discriminates in favor of the products or manufactures of the State, and against products or manufactures introduced into it from other States, or from foreign countries. Without license, and of consequence, without being subjected to penalty, the products or manufactures of this State may be carried about and sold or exchanged, while the like products or manufactures of other States, or of other countries may not be without criminality. Such discriminations in favor of our own citizens, and the products and manufactures of the State, have been very frequent in our revenue laws. That such discriminations could not be made for the mere purposes of revenue, as against the citizens of other States, or their property here situate, was settled in *Wiley v. Parmer*, 14 Ala. 627. It was, however, intimated that if the object was not taxation, but the regulation of the internal police of the State, such discriminations could be made without offending the national constitution. Following this intimation, in the subsequent case of *Seymour v. State*, 51 Ala. 52, a revenue law not differing in substance from the statute now under consideration was pronounced valid, free from all constitutional objection. It was said: "there is one class of goods that the State does not choose to tax in this way; that is, goods manufactured in the State," &c. "Has the State

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no power to do this? May not the State encourage manufactures in its own borders, by exempting the articles so manufactured from taxation for a time or altogether? This is not forbidden by any clause of the constitution of the United States, or of the State, nor relinquished to the Federal government." There can be no doubt that the decision was in accordance with the prevailing legislative policy of the State, and judicial opinion, so far as it had found expression.

More recent adjudications of the Supreme Court of the United States, to whose expositions of the National constitution all judicial tribunals must yield obedience, have placed it beyond controversy that a State cannot, either in the exercise of its taxing power, or of its police powers, discriminate in favor of its own products and manufactures, and against the manufactures and products of other States. The case of *Welton v. State of Missouri*, 91 U. S. 275, is not distinguishable from this case. A statute of Missouri imposed a license tax upon all persons peddling goods, wares, and merchandise, not the growth, produce, or manufacture of the State, excepting books, charts, maps and stationery, from its provisions. Welton was indicted for a violation of the statute, by peddling sewing machines, and was convicted. The judgment of conviction was affirmed by the Supreme Court of Missouri, the court holding the license was a mere charge upon a calling or occupation; a calling or occupation limited to the sale of merchandise, not the growth, product, or manufacture of the State. The judgment was reversed in the Supreme Court of the United States, and the statute declared violative of the clause of the constitution conferring on Congress the power to regulate commerce with foreign nations, and among the several States. The power of a State to impose a law by way of license on pursuits and occupations within its limits was admitted. But, it was said, "like all other powers, must be exercised in subordination to the requirements of the Federal constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the powers of a State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." It was further said the power conferred upon Congress "is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to

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determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited." The power, it was said further, attended commercial commodities upon their introduction into a State, and continued until they ceased to be the subject of discriminating legislation by reason of their foreign origin. In *Machine Co. v. Gage*, 100 U. S. 679, the test of the validity of State legislation, like that before us, is declared to be the question "whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is such discrimination it is fatal." See, also, *Gray v. Baltimore*, 100 U. S. 434.

It has been, however, suggested, that it is only the exemption of State products and manufactures which offends the national constitution, and this may be regarded as stricken out, leaving the general words of the statute of full force, imposing a license upon all peddlers, and not distinguishing between them, because of the origin of the products or manufactures in which they deal. A part, or a section of a statute may offend the constitution, State or National, and if there are other parts or sections, separable from, not dependent upon it, capable of full execution without it, their validity is not affected.—*Ex parte Pollard*, 40 Ala. 77. But, when the parts of a statute are so materially connected and dependent as to justify the belief that the legislature intended them as a whole; and there is an absence of good reason for the belief, that the legislature intended, if a part was incapable of taking effect, the residue should be preserved, the whole statute must fail. The statute we are considering speaks as an entirety in its purposes and objects, and it is incapable of separation and severance without violation of the legislative will. A construction of the statute which would subject to license a peddler of the products and manufactures of the State, would impose a tax, where the legislature has not made the imposition, but specially relieved and exempted from it. That would be legislation, not construction.

The judgment of the Circuit Court must be reversed, and a judgment here rendered discharging the appellant from custody, and from further prosecution.



[Sikes v. The State.]

## Sikes v. The State of Alabama.

### *Indictment against Saloon Keeper for Permitting Minor to Play on Billiard Table Connected with Saloon.*

1. *Indictment, when defective because averments relate to time when preferred.* When an indictment alleges that, "defendant is the owner or keeper of a saloon in which intoxicating liquors are kept for sale, having a billiard table connected therewith, on which the public *can* play, and knowingly permitted a minor to play thereon; such averments relate to the time when the indictment was found, and it is defective in not charging these attendant facts and circumstances, which make the act of defendant an indictable offense, to have existed at the time the alleged offense was committed.

2. "*Billiard table*," defined.—The word, "billiard table," as used in the statute (Code, § 4213), prohibiting saloon keepers from permitting minors to play thereon, includes all tables, with or without pockets, on which the game of billiards could be, and was played, at the time of its enactment.

3. "*Pool tables*;" prohibition includes playing on.—The statutory prohibition against permitting minors to play on billiard tables includes the tables on which the game of "pool" is now usually played, but on which the game of billiards was played at the time the statute was passed.

4. "*Game*;" what prohibited, for minors, on billiard table.—The game played thereon need not be that which is technically called billiards, but it must be a kindred game, which is played with balls and cues, or some substitute for them.

5. "*Playing thereon*;" meaning of, in the statute.—Mere sport or pastime on the table, or even playing with the balls, is not within the statutory prohibition, but there must be a game played, or begun to be played, with the balls and cues, or some substitute therefor, to constitute the offense denounced by the statute.

6. "*Public use of the table*;" what necessary to constitute the offense.—It is not necessary that the table should be kept for pay, but to make out the offense, it must appear that the table is such an one as the public are invited and permitted to play on, and a charge which withdraws this question from the jury, is erroneous.

APPEAL from Pike Circuit Court.

Tried before Hon. H. D. CLAYTON.

An indictment was preferred, at the Fall term, 1880, of the Circuit Court of Pike county, charging that "James D. Sikes, a person who is the owner or keeper of a saloon in which vinous, spirituous, or other intoxicating liquors are kept for sale, having a billard table connected therewith, on which the public *can* play, knowingly permitted Charley McCaskill, a minor, to play thereon." On the trial, it appeared, that defendant was the owner or keeper of a saloon, in which intoxicating liquors were kept for sale, and that in connection with said saloon he kept a table called a billiard table, and another called a "pool" table; that within twelve months be-

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fore the finding of the indictment he knowingly permitted Charley McCaskill, a minor, to play a game of "fifteen ball pool," on his table called a "pool" table; that this table was similar in construction to the billiard table, except that it had six "pockets." That the game was played with cues and balls, and by knocking the balls, which were numbered from one to fifteen, into the pockets; that this table was used exclusively for playing pool, and there had never been a game of billiards played on it. The billiard table had no pockets and the game of pool could not be played on it; that said minor did not play a game of any kind on the table called a billiard table; that the game of billiards is quite different from pool; is played with not more than four balls, and is not a substitute for it. It was proven that formerly the game of billiards was played altogether on tables like that on which Charley McCaskill played, as stated above, but that within the last four or five years these tables with pockets are not used, in many places, for the game of billiards; that billiard tables are now made without pockets, and it is no part of the game to knock the balls into the pockets as it was formerly; that where the game is played on a "carrom" table, *i. e.* one without pockets, the game is played by causing the balls to knock against each other, and is counted by rules, giving certain counts on certain contacts of the balls; but, that in many places, billiards are now played on a table, like the one called a pool table in this case. This being all the evidence, the court, at the request of the solicitor, in writing, charged the jury, "if they believed the evidence they must find the defendant guilty." To the giving of this charge defendant excepted, and requested the court to give the following written charge: "If the jury believe the evidence they must find the defendant not guilty." This charge the court refused to give, and the defendant excepted. The defendant was convicted and fined fifty dollars. The giving, and the refusal of the charges, are assigned as error.

GRIFFIN & WOOD, for appellant.—Appellant was indicted under section 4213 of the Code. This statute prohibits playing billiards, but the minor, in this case did not play billiards, he played a game of fifteen ball pool, and played on a pool table. The statute rightly construed can not be extended so as to authorize a conviction for playing pool. Penal laws are not enlarged by construction to include cases not plainly within their meaning.—*Young v. The State*, 53 Ala.; 1 Binn. 601. The evidence in the case, however, failed to show that the table was one on which the public could play. It was necessary to aver and prove this fact, which was an essential

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ingredient of the offense. The court should have given the charge requested by defendant.

H. C. TOMPKINS, Attorney-General, for the State.—The offense denounced by the statute, is permitting minors to play on billiard tables. Were it otherwise evasion would be easy. A change of the name, billiards, and of a few of its characteristics, would accomplish it. Many games could be played on a billiard table with balls and cues, which would not be billiards, as that game is ordinarily known. The presumption is, that the legislature intended to prevent minors from playing any game on a billiard table.—*Rodgers v. State*, 26 Ala. 76. The table on which the minor played, in this case, was such a one as the game of billiards was formerly played on, and such tables are still, sometimes, used for that purpose, though generally tables without pockets are used. The game played was billiards within the meaning of the statute, and was only one of the varieties of the game. The ancient orthography of the word was *balyard*, composed of ball, and yard, and it means a game played with a ball and a stick. The game played in this case answers more nearly to the definition of billiards, than the one which is played with four balls.

STONE, J.—The indictment in this case is defective. It charges that “James Sikes, who is the owner or keeper of a saloon in which vinous, spirituous, or other intoxicating liquors are kept for sale, having a billiard table connected therewith on which the public *can* play,” &c. All these averments relate to the *time present*, when the indictment was found. They should have been charged to exist at the time the alleged misdemeanor was committed; for, it is those attendant facts and conditions which make the act charged an indictable offense.—*Sherban v. Com.* 8 Watts, 212; 1 Arch. Pl. (by Waterman, 86,) and notes. If, in the present case, the indictment had charged that “James Sikes, who was at the time the owner and keeper of a saloon in which vinous, spirituous or other intoxicating liquors were then kept for sale, having a billiard table connected therewith, on which the public could play, did knowingly permit,” &c., it would have been sufficient.

In the affirmative charge given to the jury at the written request of the solicitor, the Circuit Court committed an error. It was not positively shown in the evidence that the game was played on a table on which the public could play. That is, a table kept in connection with the saloon, for the public to play on. The testimony tends to show the defendant had



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two tables—one to play billiards on, and the other, for playing the game of pool. The difference in the structure of the tables was slight. The billiard table was a modern one, without pockets. The pool table, on the model of the former billiard table, having six pockets. Both games were played with balls and cues, but while billiards was played with four balls, pool was played with a greater number. Under the title "Billiards," American Cyclopædia, it is said : "Billiard tables are divided into three classes; they may have four pockets, six, or none at all." In another place, the reader is referred to Michael Phelan's book, "The Game of Billiards," for "description of other games played on the billiard table, such as pyramid pool, pin pool, &c." This work was published in 1873. In Webster's Unabridged Dictionary, printed in 1870, the game of billiards is described as being played on a table having pockets at the sides and corners of the table. Defendant had both a billiard table without pockets, and a table with pockets, but in all other respects, like the billiard table. "It was further proved and admitted that, formerly the game of billiards was played altogether on tables with pockets, like the one on which the game of pool was played in this case; but that lately, and within the last four or five years, in some places such tables with pockets are not used for the game of billiards, and that billiard tables are now made and used without pockets." The act under which the present indictment was found was approved March 11, 1875.—Code of 1876, section 4213. This trial was had October 22, 1880.

In interpreting statutes, we must endeavor to arrive at the meaning and intention of the legislature, to be gathered from the words they have employed. Words are but the vehicle of thought; and if, since they were employed by the legislature, they have undergone change, or, if the subject they refer to has undergone modification since their employment, we must search for and enforce the sense they bore when the statute was enacted; for such, we must presume, was the intention of the law-making power. If when this statute was enacted—March, 1875—as the testimony shows billiard tables embraced both classes, those with, and those without pockets, then both classes are within its prohibition. We think the legislature intended, in the employment of the term billiard table, to include all tables on which the game of billiards was played at the time; and the language will also embrace billiard tables under any modification they may undergo. The legislature intended to regulate and restrain the demoralizing effect on the youth of the country, of having a billiard table and a drinking saloon connected together.

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Giving to the phrase its popular signification, it then embraced tables with or without pockets; all tables on which the game of billiards could be, and was played.

"Play thereon." It need not necessarily be what is technically called a game of billiards, but it must be a kindred game; a game played with balls and cue, or mace, or some substitute therefor. Mere sport or pastime on the table, or even playing with the balls, would not fall within the statute. There must be a game played, or begun to be played, with balls and cue or mace, or some substitute therefor, to be within the prohibition.

"On which the public can play." This means that the table is kept, that the public may play thereon. It need not be for pay, but it must be such as the public are invited or permitted to play on. This is a question not of law, but of fact for the jury, and should have been left to them. In not submitting this question to the jury, the Circuit Court erred.

We reverse and remand this cause, that the Circuit Court may quash the indictment. Let the accused remain in custody until discharged by due course of law.

## The State of Alabama, *ex rel.* Washington v. Hunter.

### *Proceedings for Bastardy; Plea, Statute of Limitations of One Year.*

1. *Bastardy; nature of the proceeding.*—Proceedings under the statute in a bastardy case, are *sui generis*, and while partaking of the nature of both a criminal prosecution and a civil suit, are *quasi* criminal.

2. *Same; not misdemeanor.*—A proceeding to charge a person as the reputed father of a bastard child, is not a misdemeanor within the statutes, so as to be barred within "twelve months after the commission of the offense," under § 4634 of the Code.

3. *Bastardy; proceedings in not barred by any statute of limitation.*—There is no statute of limitations in this State, which bars a proceeding under the statute to charge the reputed father of a bastard child with its support, unless, in analogy to the doctrine of prescription, it is barred by presumption, after a period of twenty years from the birth of the child.

APPEAL from Dallas Circuit Court.

Tried before Hon. G. H. CRAIG.

The facts appear sufficiently from the opinion.

H. C. TOMPKINS, Attorney-General, for the State.

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S. W. JOHN, for the appellee.

SOMERVILLE, J.—This proceeding was commenced before a justice of the peace, on March 9th, 1880, charging the appellee with being the reputed father of a bastard child, under the provisions of Chap. 6, Title I, Part 4, §§ 4071 *et seq.* of the Code of 1876.

The accused was required to enter into bond to appear for trial in the Circuit Court of Dallas county, and appearing there defended by pleading the statute of limitations of one year.

The complaint of the relator showed that she was delivered of a child on January 12, 1878, being then and at the time of becoming pregnant, a single or unmarried woman.

A demurrer to the plea was overruled, the proceeding was dismissed on a failure of the defendant to plead over, and this appeal is taken by the State, under the provisions of the statute expressly authorizing it.—Code, § 4093.

The question to be decided is, was the proceeding barred by the statute of limitations of one year?

It is insisted by appellant's counsel that this is a "civil case," and, as such, is brought within the operation of the statute of limitations of one year, as prescribed by § 3231 of the Code; and, in support of this view, we are cited to several adjudicated cases, which have so held in construing statutes somewhat resembling our own.

It might be urged with equal force that it was a criminal prosecution, as the several bastardy acts of England were pronounced to be, so that persons exempted from imprisonment on civil process, were held liable to commitment for disobedience of the orders of the Sessions touching the maintenance of the bastard child, as in *Rex v. Bowen*, 5 T. R. 156.

It is conducted in the name of the State as plaintiff, and the defendant is styled "the accused."—Code, § 4092. The process is *forthwith*, and is called a "warrant," and a preliminary investigation is had in order to ascertain "if there is probable cause to believe that the accused is *guilty of the charge*," and a bond for the appearance of the defendant may be taken as in criminal cases.—§§ 4072, 4076. And this court has pronounced such statutes "penal" in their nature, and required them to be strictly construed.—*Judge of County Court v. Kery*, 17 Ala. 328.

On the contrary, either party may appeal, as in civil cases, and a judgment for costs may be rendered against the mother who is complainant (§§ 4091, 4093); the accuser and accused are competent witnesses (§ 4078), and it is not required, as held in *Satterwhite v. State*, 28 Ala. 65, that the evidence



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should place the defendant's guilt beyond a reasonable doubt, before authorizing a conviction.

The sounder and better view, in our opinion, is, that a proceeding under our statute, in a bastardy case, is *sui generis*, and partakes of the nature of both a criminal prosecution and a civil suit, and may therefore be styled *quasi* criminal, as was done by the commissioners who digested and codified our statutes, as found embodied in "Part Fourth" of the present Code of 1876, §§ 3976-4003, p. 861.

If, furthermore, such proceedings should be considered purely civil, there could be no legal sentence of the guilty party to imprisonment, as authorized by § 4081 of the Code, for this would be clearly violative of § 21 of the Declaration of Rights, which provides that "no person shall be *imprisoned for debt*."—Const. (1875), Art. 1, § 21.

This construction, which we see fit to give to our bastardy statutes, is in accordance with the view taken by the Supreme Court of Massachusetts in *Hill v. Wells*, 6 Pick. 104; and also by the Supreme Court of Arkansas in *Jackson v. State*, 29 Ark. 62. In the latter case, the court say: "These provisions are for the benefit of the fallen mother and unfortunate child, as well as for the protection of the public, but they are *also a punishment of the guilty father*."

We think it equally clear that a proceeding in bastardy is not a *misdemeanor*, within the meaning of the statutes, so as to be barred within twelve months after the commission of the offense," under § 4614 of the Code.

A misdemeanor may be defined to be any *crime* less than a felony, and they are generally punished by *fine*, or *imprisonment*, or both. It is an essential characteristic of a misdemeanor, we think, that it should be an *indictable* offense. Bish. on Cr. Proc. § 624; Code of 1876, § 4094-6.

The word is said formerly "not to have included a multitude of offenses over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault."—2 Bouv. Law Dict. *title* Misdemeanor. Penalties recoverable by *qui tam* actions are excluded from the definition by the statute.—§ 4097.

We can see good reasons why no statute of limitations was prescribed to bar such proceedings. They are chiefly intended for the public indemnity, and to coerce the putative father to support and maintain the unfortunate child. 2 Kent's Com. p. 215. The duty of maintenance continues for a period of ten years, which, in no case, we apprehend, is to extend beyond the time of the child's minority, or legal infancy. We can see no reason why the statute should be so construed as to require such precipitation in the com-

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mencement of the proceedings, as, in many instances readily to be imagined, it would defeat the very purpose of the law. *Prewitt v. Judge of Co. Court*, 16 Ala. 705.

We hold, therefore, that a proceeding of this character is not a civil suit, nor is it a criminal prosecution. It is *quasi* criminal, partaking of the nature of both. There is no statute of limitations prescribed for such a case by statute, unless, in analogy to the doctrine of prescription, it is barred by presumption in a period of twenty years from the birth of the bastard child.—*Wilcox v. Fitch*, 20 J. 473; *Blanchard on Stat. Lim.* 2-6; *Angell on Lim.* § 9-11; *Dean v. State*, 63 Ala. 153; *Code of 1876*, § 3236.

The judgment is reversed and the cause remanded.

## Serena Jones v. The State of Alabama.

### *Indictment for Bigamy, or Polygamy.*

1. *Bigamy, or "polygamy"; who are guilty of.*—Any person having a former husband or wife, who marries again in this State, unless by the decree of a court of competent jurisdiction, such person has been divorced from the former husband or wife, and permitted to marry again, or, the former husband or wife has been continuously absent for five years immediately preceding the second marriage, and such person did not know the former husband or wife to be living, is guilty of the crime of bigamy, or polygamy, under the law of this State.

2. *Rumor or belief, that former husband or wife dead; no defense on indictment for polygamy.*—On the trial of such an offense, evidence that at the time of the second marriage, the former husband had been absent for more than a year; that defendant had heard her former husband was dead, and it was currently reported and believed that he was dead, is no defense, and is properly excluded.

3. *Polygamy, what constitutes the criminal intent in.*—In such a case, the only criminal intent, which is of the essence of the offense, is the intent to marry a second time, not knowing the husband, who had been absent only one year, to be dead.

APPEAL from Wilcox Circuit Court.

Tried before Hon. JOHN MOORE.

Serena Jones was indicted for bigamy, or "polygamy," at the Fall term, 1880, of the Circuit Court of Wilcox county. On the trial, it was proven, that in the year 1878, she was lawfully married to Albert Jones, in Wilcox county, and that she lived with him as his wife for about a year, when her husband left her and went to the State of Mississippi, and remained there for more than a year, and then returned to Wilcox county. Meantime, the defendant had married Wil-

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liam Perkins, in Wilcox county, and was living with him as his wife, when her former husband returned. The defendant proposed to prove, that while Albert Jones was absent, and before her second marriage, it was currently reported and believed in the neighborhood in which they resided, that he was dead; that she had heard nothing from him during that time except that he was dead; that she married Wm. Perkins, after the rumor became current that Albert Jones was dead; and that on the return of the latter, she ceased to live with Wm. Perkins as his wife. The State objected to the introduction of this evidence, the court sustained the objection, and defendant excepted. The defendant was convicted and sentenced to two years hard labor. The action of the court in refusing to admit this evidence is assigned as error.

J. Y. KILPATRICK, for appellant.—The evidence which was offered shows that appellant was not married the second time until her husband had been absent more than a year. She had heard nothing from him during that time, except that he was dead, and this was currently reported and believed. "Bigamy consists in the wilful contracting a second marriage, knowing the former marriage to be subsisting." *Beggs' Case*, 55 Ala. 109. Appellant believed that her first husband was dead, and that her marriage with him was not subsisting, when she was married a second time. Appellant had no criminal intent in contracting the second marriage. This is essential, in every prosecution for crime. *Actus non fecit reum, nisi mens sit rea*. The evidence offered showed that appellant had no criminal intent in contracting the second marriage, and that she did not "wilfully contract it knowing her former marriage to be subsisting," and it was error to exclude it from the jury.

H. C. TOMPKINS, Attorney-General, for the State.—The evidence which was excluded was clearly inadmissible. If the facts which were attempted to be proven, had been much stronger than mere rumor; if they had been such as to cause the appellant to honestly believe that her first husband was dead, the evidence would not have been admissible in her behalf.—See 1 Wh. Am. Cr. Law, § 83 and § 2633; *Commonwealth v. Marsh*, 7 Mete. 472; *Reynolds v. United States*, 98 U. S.; Code of 1876, § 4186.

BRICKELL, C. J.—The evidence proposed to be introduced by the appellant was, in our opinion, properly rejected. The statute imposed a penalty upon any person



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having a former wife or husband, who marries another in this State.—Code of 1876, § 4185. There are exceptions in favor of the person who has procured a decree of divorce from a court of competent jurisdiction, the decree allowing him or her to marry again; and any person who, at the time of a second marriage, did not know his or her former husband or wife was living, if such husband or wife had been absent for the last five years preceding such marriage. Code of 1876, § 4186. In its words and purposes the statute is plain. The legality of a second marriage can, but in the single instance expressed in the statute, depend upon the ignorance of the party as to the life or death of an absent husband or wife; and that is, a continuous absence for five years immediately preceding the second marriage. It was not intended, in a matter of so much importance, that parties should act upon mere absence, nor upon any belief of death not superinduced by higher evidence than mere rumor. And though there may be a continuous absence for five years, that of itself will not excuse a second marriage, if it be known to the party that the absent husband or wife is living. There must be the continuous absence connected with a want of knowledge that the absent party is in life. Whoever marries a second time, having a former husband or wife living, absent for a less period than five years, violates the statute, and is subject to punishment. Belief, honestly entertained, founded on mere report or rumor, will not excuse.—*Commonwealth v. Marsh*, 7 Metc. 472; *Dotsen v. State*, 62 Ala. 141.

But it is strenuously argued that a criminal intent is an element of every crime, and if the appellant honestly believed from the reports which had reached her, that her husband was dead, she could not have had a criminal intent. The statute, however, rendered it criminal for her to marry the second time, unless her husband had been absent for a period of five years, if he be actually living. "Whatever one does voluntarily, he intends of course to do." Every act was done by the appellant, under all the circumstances expressed in the statute, which is declared criminal, and from the act and the circumstances, the criminal intent must be deduced." There was the intent to marry a second time, not knowing the husband to be dead, who had been absent for a period of about one year only, and this is the criminal intent, and the only intent which is of the essence of the offense. In the language of C. J. Shaw, in *Com. v. Marsh*, *supra*, "the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and as the same vague evidence might cre-

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ate a belief in one mind and not in another, the law has also deemed it wise to fix a definite period" of five years continued absence, "without knowledge of the contrary to warrant a belief that the absent person is actually dead." The evidence was immaterial and irrelevant, and if it had been admitted, could not have lessened the guilt imputable to the appellant because of a second marriage prohibited by the statute.

Affirmed.

## Street v. The State of Alabama.

### *Indictment for Carrying Concealed Weapons.*

1. *Concealed weapons ; what constitutes offense of.*—To constitute the offense of carrying a concealed weapon, it must be worn, or carried, so that persons near enough to see it, if it was not concealed, can not see it.

2. *Charges may be refused, though stating law correctly, if not based on evidence.*—Charges should be based on the tendencies of the testimony, and if not correct in reference to the evidence in the case, although they may assert legal propositions correct in themselves, a refusal to give them, as requested, will not authorize a reversal.

3. *Same ; misleading charge properly refused.*—A charge "that a pistol is not concealed unless it is hid from the ordinary observation of those who are in a position to see it, if it were not concealed," is confused, and when taken in connection with the evidence in the cause—that the pistol was only seen when the defendant pulled off his coat—tended to mislead the jury, and was properly refused.

APPEAL from Etowah Circuit Court.

Tried before Hon. L. F. Box.

Henry Street was indicted, at the fall term, 1879, of the Circuit Court of Etowah county, for "carrying a pistol concealed about his person." One West testified, on the trial, that he and three or four neighbors went to defendant's house, and started to go thence to the river to bathe. They all left defendant's house at the same time, but defendant and one or two others soon got ahead of witness. When they had gone through the woods about a quarter of a mile, and when the witness was about one hundred yards behind the defendant, the latter shot a pistol at a tree. Defendant then waited till witness and those with him came up, and they examined the shot in the tree. While they were doing so, the defendant held his pistol in his hand, exposed to view, and again started off to the river with it in that position. The defendant again got ahead of witness, and he and those

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with him were about a hundred yards behind the defendant and those with him, when the latter party reached the river. When witness came up with defendant, he had pulled off his coat, or pulled it off just as witness arrived, and witness saw a pistol in the pocket of defendant's pantaloons, with the breech or "butt end" exposed to view. Defendant was dressed in a frock coat, which he wore unbuttoned all the way from his house to the river where he pulled it off. Witness was not in front of defendant at any time and saw nothing of the pistol until he shot at the tree, and saw no more of it until they reached the river. This being all the evidence, the defendant requested the court to charge the jury, in writing, as follows: "No. 2. That a pistol is not concealed, unless it is hid from the ordinary observation of those who are in a position to see it, if it were not concealed." This charge the court refused to give, and defendant excepted. The defendant was convicted, and appealed to this court, assigning as error, the refusal to give the charge above recited.

AIKEN & MARTIN, for appellant.—The charge should have been given as a general proposition of law, but especially under the facts of this case was it proper. The jury might properly have inferred from the evidence, that the defendant carried the pistol in the pocket of his pantaloons, with the breech exposed to view. The only witness testified that he was never in front of the defendant. *Jones v. State*, 51 Ala. 16, is very similar to the case at bar.

H. C. TOMPKINS, Attorney-General, for the State. (No brief on file.)

STONE, J.—The first charge asked is evidently incomplete, and we will not consider it. It is entirely true that if a pistol is so carried as that persons about the defendant can see it with ordinary observation, then it is not concealed within the meaning of the statute. To constitute the offense denounced by the statute, the pistol must be so carried or worn, as that persons near enough to see it, if not concealed or hidden, cannot see it. Charge No. 2, requested by the defendant and refused by the court, was evidently intended to assert this proposition. The question is, does it express the idea with sufficient clearness, to relieve it from the imputation of involvement or obscurity.—1 Brick Dig. 344, § 130; *Bell v. Troy*, 35 Ala. 184; 1 Brick. Dig. 339, §§ 59, 60, 61. To authorize a reversal for a refusal to charge as requested, it is not always enough that the request asserts a legal prop-



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osition, correct in itself. It must be correct, in reference to the evidence in the case. Charges should be based on the tendencies of the testimony.—*Martin v. Hill*, 42 Ala. 108; *Ross v. Pearson*, 21 Ala. 473.

Construing the charge requested by the principles stated above, we think its tendency was to confuse and mislead the jury. Few men, not members of the legal profession, would readily understand the charge as asked, to express the simple definition of concealment, as given above. It would require reflection and close examination, to detect its scope. In addition to this, to justify the defendant's acquittal, it was necessary that the pistol should be so worn or carried, as that persons near enough to see it if not hidden, could see it with ordinary observation. It was not enough that it could be seen, when the defendant took off his coat, for, by some accident, the skirt of the coat was so displaced as to expose it to view. We think the charge, if given, had a tendency to mislead the jury in this respect.—*Duvall v. The State*, 63 Ala. 12.

Affirmed.

## Adams v. The State of Alabama.

### *Indictment for an Affray.*

1. *Idem sonans*; names *Mincher*, and *Minchen*, not.—The names, *Mincher* and *Minshen*, are not *idem sonans*; and a plea in abatement, to an indictment charging Wm. Mincher with an offense, is properly sustained on proof that the defendant's name is Minchen.

2. *Variance between allegation and proof*.—Where the defendant was indicted for an affray with Wm. Mincher, and the court permitted evidence to be introduced, showing that defendant and Wm. Minshen fought together in a public place, there was a fatal variance between the allegations and the proof, the admission of such evidence was error, and it should have been excluded on motion.

APPEAL from Cherokee Circuit Court.

Tried before Hon. L. F. Box.

The facts need not be stated.

J. H. SAVAGE, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment in this case charges

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the appellant, Adams, and one William *Mincher*, his co-defendant, with an affray, for fighting together in a public place. *Mincher* filed a plea in abatement alleging a misnomer, and averring his name to be William *Minshen*, and that he was known and called by that name. The court sustained this plea and quashed the indictment as to him; Adams, however, was put to trial upon the plea of not guilty.

Under this indictment evidence was allowed to be introduced, against appellant's objection, showing that he and one William *Minshen* fought together in a public place in the county of Cherokee within twelve months before the finding of the indictment.

We think this was error, for the reason that the names *Mincher* and *Minshen* are not *idem sonans*, and there was a clear variance between the name proved and that alleged in the indictment, which is fatal. In contemplation of law they were two different and distinct persons. The plea of misnomer was properly sustained, and the evidence objected to should have been excluded.—Whart. Cr. Ev. (8th Ed.) §§ 94, 6; *Laurence v. State*, 59 Ala. 61; 1 Brickell's Digest, p. 6, §§ 84-89.

Reversed and remanded.

## McDonnell v. The Battle House Company.

*Action for Goods, Wares and Merchandise sold and Delivered.*

1. *Partnership; may be created as to third persons by the reception of profits.* Although one may not have an interest in the capital or property employed in a particular business, yet if he has an interest in the profits of such business, as profits, this will constitute him a partner as to third persons.

2. *Same; contract in this case did not create partnership.*—Where a contract provided that a hotel company should receive one-tenth of the gross receipts of the hotel as rent from their lessee, such participation in the gross receipts did not constitute a partnership between the lessee and the company.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

The facts are sufficiently stated in the opinion of the court.

BOYLES, FAITH & CLOUD, for appellant.

JOHN T. TAYLOR, for appellee.

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BRICKELL, C. J.—The facts in this case are, that on the 15th day of August, 1876, the Battle House Company leased to E. H. Rivers & Co., for the term of two years, commencing on the ensuing first day of October, the hotel situate in the city of Mobile, known as the *Battle House*, and for rent was to be paid monthly ten per cent. of the gross receipts from the keeping of the hotel, and its appurtenances. The company were to select and employ at their own expense, a competent book-keeper, who was acceptable to the lessees, by whom he was to be furnished with board and lodging, and he was to render monthly to the company, and to the lessees, a statement of the gross receipts, paying to the company ten per cent. thereof. On the 1st of June, 1877, the lease, with the assent of the company, was transferred to Moses J. Mason. On the 10th February, 1878, by verbal agreement the mode of paying rent was changed, so that as money was received, ten per cent. thereof was set apart and paid over daily, instead of monthly. After 10th February, 1878, Mason purchased from the appellant McDonnell, supplies which were used in keeping the hotel during the term of the lease, and the purpose of this suit is to recover for them of the appellee. There are objections made to some of the instructions given by the City Court upon the ground that they were misleading, or invaded the province of the jury. If the instructions are in this respect objectionable, it is not of importance, if on the undisputed facts, there is, or is not, a right of recovery; and that is the only question we deem it necessary to consider.

It is not assumed that the company and its lessees, intended the formation of a partnership, or intended to conduct jointly the business of keeping the hotel. The only relation they contemplated was that of lessor and lessee, of landlord and tenant, and the payment of ten per cent. of the gross receipts of the business as rent, as compensation for the use and occupation of the premises. The argument is, that by construction of law, as to third persons, as there was a community of interest in the gross receipts of the business, the parties sustained the relation of partners, although as between themselves there is only the relation of landlord and tenant. It is sometimes true, that contrary to their intention, persons become partners as to third persons dealing with them, when they do not intend to form that relation. This occurs in that large class of cases, when there may not be a community of interest in the property or capital employed in a particular business; yet, one of those engaged in it has a specific interest in the profits of the business, as *profits*,—a clear right to participate in the *net profits*. This,



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by construction of law, creates a partnership, for the reason, as was said by De Grey, C. J., that "every man who has a share of the profits of a trade ought also to bear his share in the loss. And if any one takes part of the profits, he takes part of that fund on which the creditor of the trader relies for payment."—*Grace v. Smith*, W. Black, 998. But a community of interest in the profits—the *net profits*, as such, is essential to a partnership. Community of interest is the basis of the relation.—Collyer on Part. 44; Parsons on Part. 41; *Loomes v. Marshall*, 12 Conn. 77; *Moore v. Smith*, 19 Ala. 780. When there is no community of interest in the *net profits*, and no such dealing as induces others to rely upon them as partners, whatever may be the relation of parties, they are not partners as between themselves, or as to third persons.

In this case, as rent the Battle House Company were entitled to one-tenth of the gross receipts of the business. In no event was it liable for any losses which might ensue, nor was the profit of the business a matter of concern to it. Whether profits were being derived was not an inquiry they could make at any time during the lease. The books abound with cases, much stronger than the present, in which it has been held that mere participation in the *gross profits* of a business did not create a partnership. There is no error prejudicial to the appellant in any of the rulings of the City Court.

Affirmed.

## Clark v. Colbert et al.

### *Statutory Real Action.*

1. *Executory contract founded on illegal consideration; not to be enforced.*—No executory contract founded on an illegal consideration can be enforced by suit, nor can any one recover, who, to establish his claim, must trace his right through such a transaction. *Ex turpi causa oritur non actio.*

2. *Executed contract based on composition of felony; law will not interfere between parties to.*—When a contract, the consideration of which is the composition of a felony, is an executed one, the law leaves all who share in such illegal transaction where it finds them, and will not interfere to rescind the contract, and recover the consideration. *In pari delicto potior est conditio defendentis.*

APPEAL from Barbour Circuit Court.  
Tried before Hon. H. D. CLAYTON.

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This was a statutory real action, brought October 14, 1878, by Nancy P. Colbert and Mary C. Allen, against Warren J. Clark. The plaintiffs claimed as the heirs at law of Avery Nolen, who died intestate in 1875. The substance of the evidence is set out in the opinion of the court. On this evidence the court below charged the jury, "that if they were satisfied from the evidence that the consideration of the deed offered in evidence by the defendant, W. J. Clark, was an agreement made or entered into between him and plaintiffs, by which he promised or stipulated to stop, compromise, or settle the prosecution, pending at the time of making said deed, against Elijah Nolen and John Allen and Avery Nolen, that said deed was void, and they must find for the plaintiffs." To this charge the defendant excepted.

The defendant requested several written charges, the substance of which was, that if the consideration of the deed was a compromise of the case against John Allen and Avery and Elijah Nolen, and that the makers of the deed procured Clark to enter into an agreement to that effect, and that they also entered into it, and if defendant took possession of the land under the deed, plaintiff could not recover. The court refused to give these charges, and defendant excepted. There was a verdict and judgment for the plaintiffs, and the errors assigned are the giving and the refusal of the charges.

D. M. SEALS, for appellant.—The deed made by appellants prevented a recovery by them, at law, for there it could only be vacated for fraud in its execution.—*Swift v. Fitzhugh*, 9 Port. 39; *Mordecai et al v. Tankersly*, 1 Ala. 100; *Morris v. Harvey*, 4 Ala. 300; *Drake v. Thompson*, 32 Ala. 99. The deed is valid between the parties, for the law leaves them as it finds them.—*Black v. Manning*, 1 Ala. 449; 2 Brick. Dig. 16, 45; *McGuire v. Miller*, 15 Ala. 394. The language of the judge in *Trammell & McCarty v. Gordon*, 11 Ala. 565, that "the land could be recovered back," is mere *dictum*.

S. H. DENT, for appellees.—The deed was clearly fraudulent and void, and the appellees, plaintiffs below, can take advantage of its illegality.—*Foreman v. Hardwick*, 10 Ala. 316; *Trammell & McCarty v. Gordon*, 11 Ala. 565. In the case last cited this court said, "a deed to land for an illegal consideration is void, and the land can be recovered back by the appropriate action"—*Ridgeway v. Underwood*, 4 Wash. C. C. 129. Appellees did not ask the court to enforce an illegal contract; and the only effect of the illegality of the deed, was to strike down Clark's title to the land. Unless the ap-

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pellees can recover in this action they are without remedy, and Clark will retain the fruits of the illegal transaction.

STONE, J.—The facts of this case are very simple. There seems to have been but one disputed question of fact, and the jury resolved that in favor of the appellees. John Allen, husband of Mary Allen, and Elijah Nolen, brother of the two plaintiffs, were under indictment in the City Court of Eufaula for arson in the second degree—the indictment found in 1874. Clark, the appellant, had suffered by the burning, and although not marked on the indictment as prosecutor, had employed counsel to aid in the prosecution. In June, 1875, the said Elijah Nolen and his two sisters, plaintiffs in this action, together with the husbands of the two sisters, being tenants in common of the lands in controversy, conveyed the same by deed of bargain and sale to Clark, on a recited consideration of four hundred dollars in hand paid; and Clark took possession, and remained in possession, under claim of right. More than three years afterwards this statutory real action was brought to recover the lands from him. There was proof tending to show, and the jury so found, that the real consideration of the deed was a composition of said prosecution for arson; and that in consideration of the execution of the deed, the prosecution was abandoned, and the indictment *nol-prossed*. On these facts the Circuit Court charged the jury that the deed was void, and plaintiffs could recover. Elijah Nolen had died before this suit was brought, leaving his two sisters his heirs at law.

There can be no question that the composition of the felony, and the dismissal of the prosecution for a valuable consideration, was a highly penal offense, and that all who aided and abetted in its perpetration were participants in the guilt. Any executory contract, or promise based on such consideration, is illegal, and no suit can be maintained for its enforcement. *Ex turpi causa, non oritur actio*. No one can recover, who, to establish his claim, must trace his right through such illegal transaction. This is common knowledge. Courts can give no sanction to such flagrant violations of the law. Addison on Contr. section 258; 1 Brick. Dig. 381; *Collins v. Blantern*, 1 Smith Lead. Ca. [161] and English notes; Benjamin on Sales, §§ 503-4. The present case arises, however, not on an executory, but on an executed contract. The plaintiffs seek to regain property which they conveyed away by deed, on the ground that the consideration was illegal—a violation of positive law.—*Walker v. Gregory*, 36 Ala. 179, was a suit to recover slaves which had been conveyed to the plaintiff on an immoral consideration. To establish her



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cause of action, she was forced to rely on the contract, which was founded on such illegal consideration. This court held she could not recover. It was added, that if she had been in possession of the slaves, and the administrator had sought to recover them from her by suit possibly she might have protected herself under the maxim, *potior est conditio possidentis*. *Dentan v. English*, 2 Nott & McC. 581, holds that an executed contract, founded on an immoral consideration, is binding on the parties. In *Gray v. Roberts*, 2 A. K. Mar. 208, the court said: "If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either, for it is a settled rule, that *in pari delicto, potior est conditio defendantis*."—S. C. 12 Amer. Dec. 383. In *Waile v. Merrill*, 16 Amer. Dec. 238—(4 Greenl. 102)—it was held that money paid on an illegal contract, voluntarily, knowingly, cannot be recovered back. The case of *Inhabitants of Warrenton v. Eaton*, 11 Mass. 368, is not distinguishable from this. The court, Parker, C. J., said: "If, then, the composition of a felony, or of a larceny, is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a court of justice; nor, can the other party, if he has paid it, recover it back again. There must then be a distinction between a conveyance of land, and money paid on such consideration, or Betsy Flagg [the grantor] could not, on this ground, avoid her deed by entry or action, so as to convey any title to the demandants. Such a distinction was attempted in the argument, but we find no foundation for it. A deed of bargain and sale, signed, sealed, delivered, acknowledged and recorded, is an actual transfer of the land to the grantee; as much as the delivery over of a sum of money, or of a personal chattel, is a transfer of those." In *Myers v. Meinrath*, 101 Mass. 367, it was said, "The policy of the law is to leave the parties in all such cases without remedy against each other." In 1 Story Eq. Ju. § 238, is the following language. "In general, (for it is not universally true,) where parties are concerned in illegal agreements, or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participation in a common crime, will not at present interpose to grant any relief; acting upon the known maxim, "*In pari delicto, potior est conditio defendantis et possidentis*." Pursuing this subject in the note, it is said: "I say *at present*, for there has been considerable fluctuation of opinion, both in courts of law and equity on this subject. The old cases often gave relief, both at law and equity, where the party would otherwise derive an advantage from his iniquity. But the modern

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doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort." In the leading case of *Collins v. Blantern*, published in 1 Smith Lead. Ca. [153], is this strong language: "This is a contract to tempt a man to transgress the law, to do *that* which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid, in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action, when you come into a court of justice in this unclean manner, to recover it back. *Procul, O! procul, este profani.*" And the American annotators, after reviewing American decisions bearing on the question, employ this language: "It is proper to say, in taking leave of this brief notice of an important and difficult subject, that the law will leave all who share in the guilt of an illegal or immoral transaction where it finds them, and will neither lend its aid to enforce the contract while executory, nor to rescind it and recover back the consideration when executed." We adopt this language as our own, and hold that under the facts shown in this record, plaintiffs can not recover.—*Black v. Oliver*, 1 Ala. 449.

Reversed and remanded.

## Thweat, Adm'r, v. Stamps.

### *Trover.*

1. *Growing crops pass to purchaser of land at execution sale.*—Growing crops are part of the realty, and pass with the title to the land to a purchaser at execution sale.

2. *"Rails and brick," when personally and when realty.*—"Rails and brick" not connected with the freehold are personal property, and do not become fixtures until they are actually or constructively annexed to the realty.

3. *Trover; fixtures annexed to the realty not recoverable in.*—Trover lies only for the conversion of personal property and can not be maintained, at least between vendor and vendee, to recover fixtures which form part of the freehold.

4. *Fixtures annexed to realty; action lies for refusal to allow severance.*—When fixtures are annexed to the freehold, a demand should be made for the right of removal, and on refusal an action lies for preventing the owner from exercising the right to sever.

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5. *Trover; what necessary to sustain action of.*—To sustain an action of trover the defendant must have unlawfully assumed dominion over the property in defiance or exclusion of the plaintiff's right, or withheld possession from him under claim of title inconsistent with the plaintiff's.

6. *Conversion; what necessary to constitute.*—A vendee of land whose tenant annexed "rails and brick," which were on the land at the time of the sale, to the realty, is not guilty of a conversion unless he directed, induced, or ratified the act of his tenant in the exercise of an unauthorized dominion over the property.

APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

On December 7th, 1874, appellee P. A. Stamps bought a tract of land lying in Talladega county, at sheriff's sale, and soon afterwards went into possession of it. At the time of the sale there was a lot of bricks on the land, and also five thousand rails, which were the property of L. Dickinson, who owned the land until it was sold by the sheriff. A part of the land had been planted in wheat before the sale. Dill, who resided on the land and was defendant's tenant, used the bricks to build a chimney to a house situated on the land, and used the rails to build a fence on the premises. The defendant did not order or direct his tenant, Dill, to use the rails or brick, and when the latter asked his permission to do so, replied that he might do so "so far as he cared." The wheat was gathered in the summer of 1875 by Dill and others, and defendant received two-thirds of it from them. On the 10th day of February, 1877, Dickinson, appellant's intestate, brought this action of trover against Stamps to recover the "rails and brick" and the wheat received by him from Dill and others, and the foregoing facts appearing in evidence, the court charged the jury, that plaintiff could not recover anything for the "rails or brick" unless the evidence satisfied them "that the defendant directed or in some way induced the bricks to be used in building the chimney, or the rails to be put on the fence." To this charge the plaintiff excepted. The court also charged the jury that "if they believed from the evidence that the wheat was sown on the land before the sale by the sheriff, and had not been gathered at that time, the growing crop on the land was part of the land, and the title to the wheat passed to the defendant by his purchase at the sheriff's sale, and the plaintiff could not recover for the wheat." To this charge the plaintiff also excepted. The charges given by the court are assigned as error.

JOHN T. HEFLIN, for appellant. (No brief on file.)

SOMERVILLE, J.—It is well settled that growing crops



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pass to a vendee, with the title of land upon which such crops are standing at the time of sale. In this case, the wheat was in process of growth, and ungathered, at the time of the sheriff's sale, and was part and parcel of the realty. The interest, which the defendant in execution had in it, passed with the title of the land to the purchaser, and there was no error in the Circuit Court so charging the jury." Freeman on Executions, § 474; 4 Kent Com. 468; 3 Wash. Real Prop. 625, note (1); *Footte v. Colvin*, 3 Johns. 216; *Crews v. Pendleton* (1 Leigh. 297); 19 Amer. Dec. 750 and 752, (note).

The rails and brick were personal property so long as they remained disconnected from the freehold. They could not become fixtures until they were actually or constructively annexed to the realty.—Ewell on Fixt. 345; *McLaughlin v. Johnston*, 56 Ill. 163. And, since trover lies only for the conversion of personal chattels, it cannot be maintained for the recovery of such fixtures when annexed to and constituting part of the freehold, at least as between vendor and vendee. When so annexed, a demand should be made for the right or privilege of removal, and in case of refusal, an action would lie for preventing the plaintiff from exercising the right to sever. The evidence here shows no such demand.—Ewell on Fixt. 434-5, note (4); *Villas v. Mason*, 25 Wis. 310; *Miller v. Baker*, 1 Metc. 27.

In order to sustain the action of trover, moreover, there must have been, on the part of the defendant, some unlawful assumption of dominion over the property in question, in defiance or exclusion of the plaintiff's right, or else a withholding possession from the plaintiff, under a claim of title, inconsistent with his own. The defendant would not be guilty of a conversion unless he directed, induced or ratified the act of Dill, in his exercise of an unauthorized dominion over the property, if such it was under the evidence. 2 Greenl. Ev. § 642; Ewell on Fixt. 434.

The rulings of the Circuit Court were in harmony with these principles, and the judgment is affirmed.

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**Jackson et al., Adm'rs, v. Scott et al.***Statutory Real Action.*

1. *Mortgage, sale of lands under, when a nullity.*—A sale of lands, under a power of sale contained in a mortgage, which rests wholly in parol, does not divest the mortgagee of the legal title, nor cut off the mortgagor's equity of redemption, and is a mere nullity.

2. *Same; payment of mortgage debt, no defense to action of ejectment.*—Payment of the mortgage debt, in whole or in part, after forfeiture, is no defense to an action of ejectment by the mortgagee.

**APPEAL from Randolph Circuit Court.****Tried before Hon. JOHN HENDERSON.**

This was a statutory real action brought on January 28, 1876, by H. R. Jackson and Mary A. Jackson, as administrator and administratrix of the estate of Wm. Jackson, deceased, against John R. Scott and J. Hawkins. On the trial, the plaintiffs put in evidence a mortgage made March 18, 1871, by Benj. East and wife, conveying certain lands to Wm. Jackson, to secure the payment of two promissory notes. The land was described in the mortgage as "the north quarter of the south-west quarter of section 12, in township 20, and range 11, also a part of the north-west quarter of the south-west quarter of same section, township and range, commencing at the south-east corner of said tract, and running north two acres in length and one in breadth, containing two acres, on which are situated the mills." The complaint claimed the north-east quarter of the south-west quarter of section 12, township 20, range 11, besides the other land described in the mortgage. The plaintiffs proved that Benj. East, at the time of the execution of the mortgage, was in possession of the land described in the mortgage exercising acts of ownership over it. The plaintiff, for the purpose of showing that the north quarter of the south-west quarter, described in the mortgage, was the north-east quarter of the south-west quarter, offered to prove that Benj. East, at the time the mortgage was executed, resided on, and owned, the north-east quarter of the south-west quarter of said section, township, and range, and that it lay adjoining, and to the east of, the two acres described in the mortgage, and that he owned no other lands in said section 12. The court refused to allow this proof to be made for that purpose and plaintiff excepted. The defendants proved that in January, 1876, H. R. Jackson,

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as administrator of Wm. Jackson, sold the land described in the mortgage under the power of sale contained therein, besides the remnant of a stock of goods and accounts which were bid off by him for the estate of Wm. Jackson, at \$748.52. No deed was made to any part of the land under or by virtue of the sale, and no memorandum thereof in writing was made at the time of said sale. The defendant offered to show by Benj. East that the value of the accounts, and the remnant of the stock of goods, exceeded the amount due on the mortgage, but the plaintiffs objected to this evidence. The court sustained the objection, and defendants excepted. The court, at the request of the defendants, charged the jury, in writing, that if they believed all the evidence they must find for the defendants. The court gave this charge, and defendants excepted. The ruling of the court on the evidence, as shown above, and the giving of the charge, are assigned as error.

WATTS & SONS, for appellants.—The evidence to show that by the north quarter of section 12, was meant the north-east quarter of the south-west quarter, did not tend to contradict or vary the deed, but merely identified the land actually conveyed. It was competent to explain the latent ambiguity as to which one of the two quarters of the south-west quarter was meant.—*Wilkerson v. Hughes*, 35 Ala. 453; 28 Ala. 164; 27 Ala. 142; 33 Ala. 161; 8 Ala. 502; 41 Ala. 292; Whart. on Ev. 941, *et seq.* The mortgage vested the legal title to the lands in Wm. Jackson, and his personal representative could maintain ejectment.—*Lewis v. Wills*, 50 Ala. 198; *Russell v. Irwin*, 41 Ala. 292. The sale of the land, whether valid or invalid, could not prevent a recovery of the land sold and bought for the estate.—45 Ala. 482; 2 Jones on Mortgages, 1894. The title of Jackson was not divested by the sale.—37 Ala. 354; 14 Ala. 476. The general charge given by the court was erroneous. Payment of the mortgage debt, after forfeiture, is no defense to an action of ejectment by a mortgagee.

SMITH & SMITH, for appellee. (No brief on file.)

BRICKELL, C. J.—1. The lands are not accurately and artificially described in the mortgage, yet, taking the description in its entirety, there is no uncertainty as to the lands intended to be conveyed. The conveyance is of two several and adjoining parcels of land. The parcel of two acres, on which the mills are situate, is not part of the other parcel, designated as the *north quarter* of the quarter section. They form a separate tract, conveyed in addition to the tract there-



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by designated. They adjoin that tract, and are described as *part of the north-west quarter of the quarter section*. The boundary of them is commenced at the south-east corner of *the said tract*, referring evidently to the preceding words, *north-west quarter of the south-west quarter*. Thus, it is rendered certain, looking alone to the description, that *north quarter* means, and can mean only, *the north-east quarter of the south-west quarter*. To that quarter only are the words capable of application, and the whole description, when taken in connection, of itself applies the words to that quarter. When so applied, there is no uncertainty or ambiguity to be explained by parol evidence, or by resorting to the relations of the mortgagor to the several parcels of land.

2. The sale of the lands under the power in the mortgage, resting wholly in parol, did not divest the legal estate of the mortgage, or cut off the equity of redemption of the mortgagor—it was as to the lands a mere nullity. Payment of the mortgage debt in part, or in whole, is not in a court of law a defense to an action of ejectment brought by the mortgagee. *Slaughter v. Doe, ex dem, MSS.* The Circuit Court erred in the charge given on the request of the defendants.

Reversed and remanded.

## Turnley et al. v. Hanna.

*Bill in Equity to enjoin action of Forcible Entry and Unlawful Detainer, and to remove Cloud from Title.*

1. *Possession of land acquired by force; equity will not protect.*—When possession of land is acquired by such force as to entitle the party evicted to maintain an action of forcible entry and unlawful detainer, equity will not entertain a bill founded on such possession, to enjoin the action, and to remove a cloud from complainant's title to the land.

APPEAL from DeKalb Chancery Court.

Heard before Hon. H. C. SPEAKE.

This bill was filed, Nov. 4, 1873, by A. B. Hanna, against Mathew J. Turpley and others, praying for an injunction to restrain an action of forcible entry and unlawful detainer, and other actions brought by Turnley and others, to recover possession of certain lands, described in the bill, from Hanna and to remove a cloud on complainant's title to the land. The Chancellor granted a perpetual injunction against Turnley et al., restraining them from prosecuting the action of

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forcible entry and unlawful detainer, and other actions then pending, and ordered the cloud removed from the title. The opinion states the facts so far as they are necessary to properly understand the decision. The rendition of the decree as stated above, is assigned as error.

M. J. TURNLEY, W. H. FORNEY, COOPER & REEVES, and WATTS & SONS, for appellants.—The only possession which Hanna had of the land in controversy, when he filed this bill, he had acquired by force. Possession thus acquired did not authorize him to maintain a bill to remove a cloud from his title, for the possession which gives equity jurisdiction in such cases, must have been acquired in a lawful way.—*Hardin v. Jones*, 86 Ill. 313; *Comstock v. Henberry*, 66 Ill. 212. To permit one to avail himself of such possession, would be enabling him to make his own force and unlawful acts a basis for equitable relief. But it is well settled that a claimant of lands, who is not in actual possession, however good may be his right, can not file a bill to set aside adverse deeds alleged to constitute a cloud on his title.—*Daniel v. Stewart*, 55 Ala. 278. Nor will equity undertake to establish legal rights when there is an adequate remedy at law.—*Youngblood v. Youngblood*, 54 Ala. 486.

RICE & WILEY, for appellees.—The only plausible ground urged by counsel for Turnley for reversal is, in substance, that appellee, the true owner, last obtained possession by artifice. Even if the true owner did last obtain possession by artifice, or even by force, he might be indicted for such force, but would be entitled to all the protection for his possession to which he would have been entitled, if he had regained possession in a manner free from criticism. The Chancery Court has no criminal jurisdiction, and when it is appealed to by the true owner of real estate, in possession, for the protection of his possession against such disturbers as were the original defendants, it will give him that protection, and will not *confiscate* his undeniable right of recaption and re-entry, nor hold that the exercise of his right of recaption or re-entry, has annihilated his right to invoke for his possession (although acquired last by artifice or force), the protection which courts of equity extend as against such disturbers as were the original defendants.—3 Bouvier's Institutes, 20-24; *Mahone v. Reeves*, 11 Ala. 345.

STONE, J.—The title to the lands in controversy in this suit was originally in George E. Patton. Each litigant claims from him, as the original source of his claim of title. He

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was in possession in 1849, and continued to reside on the lands for near ten years afterwards. Whether he occupied as tenant of Brown, Hanna's vendor, or with his permission, is not very clearly proved—but the tendency of the testimony is, that he remained there with the permission of Brown, who was his son-in-law. In 1859 Patton sold and conveyed an undivided half interest in the lands to Turnley and Higgins. For Hanna it is contended that the lands, in 1849, were sold by the sheriff under judgments and executions against Patton, and conveyed by the sheriff to White, the purchaser; that White purchased for Brown, paying the purchase-money, and agreed to convey to Brown, on the latter repaying to him the money so paid; that Brown moved upon the lands when the purchase was made, and afterwards paid White the purchase-money; that White refused to convey, and Brown filed a bill against him to compel specific performance, which was decreed to him in 1854. Brown afterwards—about 1869 or 1870—sold and conveyed the lands to Hanna. For Turnley and his co-appellants it is contended, that after the sheriff's sale, and within two years, Patton redeemed the lands from White, paying the purchase-money, the interest, and all lawful charges; that he remained in possession in his own right until 1859; that he then sold and conveyed an undivided half interest in the land to Turnley and Higgins; that soon afterwards he left the lands, and removed to the State of Tennessee, where he died about the year 1861; that Mrs. Patton returned to Alabama about 1862, and re-occupied her former residence on the lands in controversy; that there was administration on the estate of Patton, granted in DeKalb county, and at the instance of such administrator, dower was allotted to Mrs. Patton in said lands, including her homestead; that she remained in possession of said dower interest until late in the year 1869, or January 1870, when she sold and conveyed her dower interest to Hanna, moved off the premises, and died in 1871. That the administrator obtained an order to sell the undivided half interest in said lands, and did sell said interest, as the property of the estate of said George E. Patton, and Collins became the purchaser, and received a conveyance.

As to the possession. The proof, as we have said, reasonably satisfies us that Brown was in the actual possession and occupancy of the land for some five or more years, when he removed to the State of Tennessee about 1856, where he has since continuously resided. The proof also tends to show that for some time after he left he had a tenant on said lands, occupying in his right. We infer from certain circumstances



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this tenant-occupancy continued until 1860 or 1861. From that time we hear of no possession had or asserted by Brown, or any one in his right, until late in November, 1869. The testimony offered for appellants—defendants below—shows that they claimed control of the lands, exercising some acts of ownership, from and after 1862, until about December 24th, 1869; the administrator of Patton, after he was appointed, uniting with Turnley in this asserted ownership and control. Turnley rented out the lands, and had tenants upon them, from 1866 on, for some years. In the summer of 1869, a cabin was built on the lands, under Turnley's permission, and occupied, in part, by members of Turnley's family for two months. In November, 1869, Turnley had other cabins built and occupied by tenants. At this time no one was in the actual occupancy of the lands, except Mrs. Patton, the dowress, and said tenants of Turnley. The cabins were small, and very inferior. Brown, at this stage of the controversy, appeared on the premises, with others, his employees—and sometimes with Hanna—and Brown and his assistants demolished one or more of the houses, removed the timbers, burned some, and hauled Turnley's furniture, of little value, to a neighboring house, and left it there. They broke into one house that was locked, and continued to occupy it. On the 24th December, 1869, Brown and one Holton, together with others, by force, threats and intimidation, caused all of Turnley's tenants to leave the premises, and occupied them themselves. Hanna was present, and soon after took possession under his purchase from Brown. In January, 1870, Mrs. Patton left the premises and State, having sold her dower interest to Hanna. She died in 1871. The testimony of Turnley and his witnesses, if not disproved or disbelieved, is sufficient to establish possession in him and Collins, and such forcible eviction and holding, as to maintain an action of forcible entry and detainer. It is a dangerous practice, severely condemned by the law, to adjust private disputes by the strong arm of force.—*Davidson v. Phillips*, 9 Yerg. 93; *Childress v. Black*, *Id.* 317; *Turner v. Liembrick*, Meigs, 7.

Soon after this, Turnley and Collins commenced an action of forcible entry and detainer against Brown and Holton, for the forcible eviction, and recovered a judgment before a justice of the peace. Defendants took an appeal to the Circuit Court, and while the case was pending on appeal, Hanna filed this bill. He alleged he was in possession, had a good title; and the object of his suit is to remove the cloud from his title, caused by the claims of Turnley, Higgins and Collins, to quiet his possession, and to enjoin the said action of forcible entry and detainer, and some other suits Turnley

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was prosecuting growing out of their contention over the possession of said land.—*Hamilton v. Hendrix*, 1 Bibb, (Ky.) 67, was a case very like the one in hand. The court ruled that “a person holding the elder legal title, and in possession by force, and thereof convict, can not resort to a court of equity to try the right.” The court, in commenting on the facts of that case said: “Considering the complainant as a *tort-feasor*, can it be said that equity should stretch for him a helping hand, yet further than if he had not been guilty, or had repaired the wrong? Or, does it become a court of equity to encourage breaches of the peace, by acknowledging a possession so acquired as the foundation of jurisdiction, and protecting that possession to the end of a controversy upon conflicting claims?” See, also, *Dedman v. Smith*, 2 A. K. Marsh, 260; a very strong case. In the case of *Comstock v. Henberry*, 66 Ill. 212, the principle is thus stated: “When the holder of an adverse claim of title to land took possession and leased the same for five years, and the complainant, also claiming title to the same land, procured the tenant to attorn to him, and the original lessor, by forcible detainer, recovered the possession, which was, on the following night, forcibly retaken by the tenants of the complainant, who filed his bill in equity to enjoin the prosecution of an action of forcible entry and detainer, and to quiet his title as against the holder of the adverse title: *Held*, that while the complainant was in the actual possession of the land at the time he exhibited his bill, yet, as it was obtained unlawfully and forcibly, he could not be allowed to take advantage of his own wrong, and would be considered in equity as out of possession, so far as the question of jurisdiction was concerned; and being out of possession, he had a complete remedy at law, and a court of equity could not entertain his bill.” In *Hardin v. Jones*, 86 Ill. 313, the court, in speaking of bills to remove a cloud from title, said: “The ‘possession that gives jurisdiction in such cases must be such as was acquired in a lawful way, for it can not be that equity will lend its aid to protect a possession wrested from another by violence, or obtained by the use of any unfair or corrupt means. \* \* \* His wrongful act can afford no foundation for equitable jurisdiction and relief.” *Hamilton v. Adams*, 15 Ala. 596, is decisive of this case. In that case there had been a forcible eviction, and a suit and recovery in forcible entry, and detainer. The party who had thus tortiously acquired possession, filed his bill, setting up good title in himself, that the plaintiff in forcible entry and detainer was insolvent, and praying an injunction, restraining the writ of restitution. This court said: “It is immaterial how perfect a man’s title may be, if he enters upon the pos-

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session of another who has no title whatever, by violence, he cannot protect himself against the proceeding for a forcible entry and detainer."

Applying the principles stated above to this case, however, has no such possession as will give him a standing in a court of equity. Having entered by force, and thus violated the law, he has disabled himself from invoking the aid of the Chancellor to protect him in his possession.

The decree of the Chancellor is reversed, the injunction dissolved, and this court, proceeding to render the decree the Chancellor should have rendered, doth order and decree that the complainant's bill be dismissed, at his costs, and the costs of the appeal, both in the court below and in this court.

BRICKELL, C. J., not sitting.

## Thompson v. The State of Alabama.

### *Indictment for Unlawfully and Wantonly Killing an Animal.*

1. *Trespass to pursue animals with dogs and kill them.*—One who pursues with dogs, and kills animals belonging to another, when found injuring his crops, even though they may have broken into his field, is guilty of trespass.

2. *"Unlawful," to commit trespass.*—One who commits a trespass in killing an animal, kills it "unlawfully."

3. *Malice not an ingredient of offense of unlawfully or wantonly killing animals.* Malice is not an ingredient of the offense of unlawfully or wantonly killing an animal as denounced by the statute (Code, § 4403), and if the defendant killed the animal unlawfully, he is properly convicted of such offense.

### APPEAL from Bullock Circuit Court.

Tried before Hon. H. D. CLAYTON.

Platt Thompson occupied lands on which there was a corn crop growing in a field through which ran a road. The road began on, and ran through, the lands of Joseph Howard, who resided on and cultivated land adjoining Thompson's, and entered the premises of the latter through a gate, which formed part of the partition fence between the two neighbors. This gate was not always closed, and the fence, which was "a very good fence," but "not a lawful fence," was down in several places. Joseph Howard owned a hog, and this hog had gone through the open gate, or through the gaps in the fence, several times, and had destroyed much of Thompson's corn; and the latter notified Howard, that if he did not keep his hog out of the field, he would kill it, but Howard



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made no effort to do so. The said hog again entered Thompson's field, either through the gate, or the "gaps" in the fence, and fell to eating or destroying the growing corn; and, in an effort to drive the aforesaid hog from the field with dogs and sticks, it was killed by Platt Thompson, wherefore, he was indicted for "unlawfully or wantonly killing a hog, the personal property of Joseph Howard." On the trial, proof having been made of the foregoing facts, the court charged the jury: "That although the hog had frequently entered defendant's field and damaged his crop, this gave him no right to kill it; that he had a right to use so much force as was necessary to get it out and protect his crop, but in doing so, he was required to be careful, and do no more injury, if any, to the hog, than was unavoidable in getting it out." The defendant excepted to each of these charges. The defendant requested the court to charge the jury: "That if they believed the evidence of the witnesses as to the fence, the injury to the crop, and the notice to Howard, to be true; and that the hog could only have been kept out of the crop by building a lawful fence around it, they must find the defendant not guilty. The court refused to give this charge and the defendant excepted. The defendant was convicted, and fined twenty dollars.

No counsel marked for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment in this case charges that the appellant "unlawfully or wantonly killed, disabled or destroyed a hog, the personal property of Joseph Howard."—Code (1876) § 4409. The hog is shown to have been killed while in the act of eating or destroying a growing crop of corn on the premises of the defendant, Thompson; and the killing was perpetrated by dogs and with sticks, in an effort to drive the animal from the field. The partition fence between the adjoining lands of Howard, the owner of the hog, and those of the defendant, was not a lawful fence within the description of the statute (Code, 1876, § 1584.) It is shown that the hog may have entered either through an intervening gate, which was sometimes open, or through gaps in the partition fence, and had before depredated upon the same crop, destroying a portion of it, of which fact Howard had been informed with an accompanying threat that defendant would kill the hog unless it was prevented from trespassing on him again.

It is insisted that the killing of the animal under this state

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of facts was not unlawful, but so far justifiable as to exculpate the defendant from liability to conviction under the statute. If the act of the defendant was a trespass, then it was unlawful, and he was properly convicted.

Every person has a lawful right to defend his person or his property, not for the purpose of redressing an injury already perpetrated, but purely upon the principle of prevention, in the present and for the future. Yet this right, valuable and important as it is, must be commensurate with, and strictly limited to, the existing necessity. The exercise of it beyond this constitutes the party a trespasser.—Cooley on Torts, 50; Walker's American Law, (7th ed.) 217; *Russell v. Barrow*, 7 Port. 106.

The general principle is not denied that a person may lawfully kill an animal when necessary for the preservation of his property, as when one shoots a dog accustomed to injure sheep, and found at the time in the act of killing one. 2 Water. on Tres. § 907. Nor that he could at common law lawfully employ a dog to drive from his premises the cattle of another, which are there wrongfully, doing damage, (1 Comyn's Dig. 419), unless it appear that, owing to the size, character or habits of the dog, or the mode of setting him on, the owner of the premises acted without ordinary care or prudence.—*Wood v. LaRue*, 9 Mich. 158.

But apart from the new liabilities created by the statute, having reference to the subject of lawful fences, it has been repeatedly decided, that one is guilty of a trespass who pursues with dogs and kills the animal of another, found injuring his crops, even though such animal, so found trespassing, may have broken into a field of the person killing it.—*Ford v. Taggart*, 4 Tex. 492; *Bost v. Minges*, 64 N. C. 44; 2 Water. on Tres. § 899. And notice given of an intention to do so is regarded as a mere threat to do an illegal act, and would not vary the liability.—*Clark v. Keliher*, 107 Mass. 406.

Under the existing statutes, which require partition fences between improved lands to be erected and repaired at the joint expense of the occupants, it has been held that one would not be liable for damages done by his cattle breaking through the partition fence and destroying the crop of the other, the duty to repair devolving equally on each.—*Walker v. Watrous*, 8 Ala. 493. And section 1587 of the Code (1876) now provides as follows: "If any trespass or damage is done by an animal breaking into lands not enclosed as in the preceding section is provided, the owner is not liable therefor; and if any person *injures or destroys any such animal*, he is *liable to the owner* for five times the amount of the injury done, to be recovered before any court of competent jurisdiction."

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The question in this case is not the liability of Howard, the owner of the hog, to the defendant Thompson, for the destruction of the crops of the latter. That point is totally immaterial. The contention has reference only to the matter of Thompson's liability to Howard for killing or injuring the hog. This, we think, was, under the facts of the case, a trespass, and was therefore unlawful, and if unlawful, the defendant was guilty of the offense charged in the indictment, malice under this section of the Code not being an ingredient of the offense.—Code, § 4409.

The evidence does not disclose whether the hog entered Thompson's field by breaking the partition fence, or through the gate which was negligently left open. Hence we have discussed the question presented in both aspects of the case. In either view there is no error in the rulings of the Circuit Court, and its judgment is affirmed.

## Fairbanks, Morse & Co. v. The Eureka Company.

*Detinue for a "Track Scale" by Vendor after conditional sale.*

1. *Record of written contract, when not notice.*—The record of a written contract for the conditional sale of personal property, in the office of the judge of probate, is unauthorized by statute and is not notice to a sub-purchaser, of the claim of the original vendor.

2. *Possession only prima facie evidence of title.*—The possession of personal property is only *prima facie* evidence of title, and cannot be relied on as higher evidence to divest the true owner of the title to his property.

3. *Conditional sale; right of vendor against sub-purchaser.*—A purchaser of personal property from one who holds possession under an incomplete conditional sale cannot defeat a recovery by the original vendor, although he is a *bona fide* purchaser for value and without notice.

APPEAL from Shelby Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was an action of detinue brought by Fairbanks, Morse & Co., against the Eureka Company, to recover a thirty ton "Track Scale." On the trial, it was shown that one C. O. Godfrey sent the following order to the plaintiffs on the day of its date, viz: "Town of Helena, County of Shelby, State of Alabama. Messrs. Fairbanks, Morse & Co.—Please send me from Nashville one thirty ton track scale, thirty-three feet platform, marked to C. O. Godfrey, Helena, for which I agree to pay seven hundred and fifty dollars, as follows: One-



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third cash when built, balance in four and six months: and it is agreed, that you do not part with nor relinquish your claim on or title to said scale until it is fully paid for; and in default of the payment for the scales as agreed, you or your agent may, without process of law, take possession of and remove said scale, and collect reasonable charges for the use of the same. Scale warranted durable and accurate. To be built by Fairbanks, Morse & Co. about as soon as ready. If the purchaser delays having the scale built thirty days after the time set for delivering, then this order shall become due and payable the same as if the scale had been built at the time stated. C. O. Godfrey."

On December 17th, 1874, this contract was filed in the office of the judge of probate of Shelby county for record, and was duly recorded there. The scale was sent by plaintiffs to Godfrey, and was received and used by him for weighing coal. One-third of the purchase-money—\$250—was paid in cash. At the time of the trial, the scale was in possession of the Eureka Company, and was worth about \$500. The evidence for the defendant showed that on April 28th, 1875, said Godfrey, who had possession of the scale and was using it, sold it to the defendants for value, and conveyed it to them in writing; that defendant was a *bona fide* purchaser of the scale and had no actual notice of the written contract between plaintiffs and Godfrey, which is set out above, nor of any claim to the scale by any person other than said Godfrey; that defendant received possession of the scale on April 28th, 1876, and had used it since that time; that it had no notice that the paper set out above had been recorded or had been filed for record. The court charged the jury that the mere fact that the contract between Godfrey and the plaintiffs was recorded in the office of the judge of probate of Shelby county would not be notice to the defendant of plaintiff's claim to the scale. The court further charged the jury, "that if the jury believe, from the evidence, that the only notice which defendant had of the claim, title or lien of the plaintiffs to the scale when defendant bought of Godfrey, was the mere fact that said writing was recorded as aforesaid, and that the defendant was at the time of the purchase without any actual notice of plaintiffs claim or title to the scale, and that defendant purchased said scale in good faith from said Godfrey, and paid him at the time an adequate and valuable consideration therefor, while said Godfrey had the actual use and possession of said scale; and if defendant has shown these facts to the satisfaction of the jury, they will find the issue in favor of the defendant; "and if the jury are satisfied that the foregoing is all of the evidence, and that all the

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facts as stated above are true, in that event, they will find for the defendant." The plaintiffs excepted to these charges. There was a verdict for the defendants, and the plaintiffs appealed to this court, and assign the charges of the court as error.

WILSON & WILSON, and J. N. ARRINGTON, for appellants.

TERRY & LANE, for appellee.

BRICKELL, C. J.—In *Sumner v. Woods*, 52 Ala. 94, it was decided, that a sale of a chattel, the vendor parting with possession, upon the condition that the title should not pass until the purchase-money was paid, was valid between the parties, but, as to *bona fide* purchasers from the vendor, he would be deemed the true owner, and they would acquire a title which would prevail over that of the vendor, though the condition was never performed. The reason given for the decision was, that "the great mark of ownership of personal property is *possession*; and when a contract is made, by which it is intended that the property should be apparently in one, while it is in fact in another, the world has a right to suppose that the one in possession is the owner; and such a contract cannot be set up, to the prejudice of *bona fide* creditors and purchasers without notice. As has been justly said, such contracts are out of the usual course of business, unnecessary, and directly tend to the injury of those who are not in the secret." The only authority cited is *Martin v. Mathiot*, 14 Serg. & R. 211.

In *Dudley v. Abner*, 52 Ala. 572, there was a very elaborate discussion of the question by Justice MANNING, who was of the opinion, that a sale upon condition that the title to the chattel should remain in the vendor until the purchase-money was paid, was in its nature a parol chattel mortgage, void as to *bona fide* purchasers, and as to creditors, unless there was registration of it in pursuance of the statute. The contrary doctrine was asserted in *Holman v. Lock*, 51 Ala. 287, in which it was in effect decided, without discussion, that a sale and delivery of goods, on condition that the property was not to vest in the vendor until the purchase-money was paid, did not pass the title until the condition was performed. If the condition was not performed, the vendor could reclaim and re-possess himself of the property, from one acquiring possession from the vendee, by a purchase for a valuable consideration, in good faith, and without notice.

The court was soon involved in difficulty and embarrassment, by the decisions in *Sumner v. Woods*, and *Dudley v*

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*Abner, supra*, when it was sought to apply the principle on which they rest to executory agreements of sale, and to other cases in which the owner had voluntarily intrusted the possession of goods to another, not clothing him with any other *indicia* of ownership than mere possession and use.—*Leigh v. M. & O. R. R. Co.* 58 Ala. 165. In view of the conflict of decisions in this court, and of these embarrassments and difficulties, in *Sumner v. Woods*, at the present term, the former decision in the cause, and that of *Dudley v. Abner, supra*, was overruled, and the authority of *Holman v. Lock, supra*, was restored.

The authorities, English and American, with but few exceptions,—and some of these, as in Illinois, dependent on statutes,—are conclusive on the right of a vendor, in the sale and delivery of a chattel, to stipulate for a retention of title until the performance of conditions agreed upon as precedent to the passing of title.—Story on Sales, § 313, and notes; Benjamin on Sales, §§ 320 *et seq.*, and notes; 2 Kent's Com. 498; *Fosdick v. Schall*, 99 U. S. 235. In such a case, the vendee is clothed with no other apparent *indicia* of ownership than the possession; and with that a mere bailee is clothed. The contract is not illegal, or immoral, or violative of public policy, unless it can be said that it is wrong for the owner ever to part with possession, because the world may be induced to suppose that the possessor is the owner, and as such to deal with him. The truth is, possession is but *prima facie* evidence of ownership of all species of personal property, except commercial paper; and whoever deals upon the faith of it, as evidence of ownership, must accept it as the law declares it—*prima facie*, or presumptive evidence only, subordinate to the paramount title, which would prevail if the possession was not changed by the transaction into which he enters. If he complains that the owner has misled him by parting with the possession, the answer is, that the possession is but presumptive evidence of title, and beyond it, if protection is sought, inquiry ought to be made.—*Leigh v. M. & O. R. R. Co.* 58 Ala. 178. The observation of WILLIAMS, C. J., in *Forbes v. Marsh* (15 Conn. 398), has been often quoted, as eminently just: "The vendee comes into possession of property, which was known to belong to another man. Whether, therefore, the vendee had borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property on the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly, we find that all these cases of conditional sales, made *bona fide*, have been held good as against attaching creditors,



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as well as against the parties." It is only when some one has relied on possession, as conclusive evidence of ownership, while the law authorizes him to treat it as simply *prima facie*, or presumptive evidence, that there is complaint of this and kindred principles, which have long prevailed in the law of sales of personal property. The law has not invited such reliance, and it is folly, or misfortune, that he ascribes to it a higher dignity, and a conclusiveness the law has not ascribed. When the owner of personal property parts with the possession merely, not conferring any other *indicia* or evidence of ownership, it is a wrong to him, a deprivation of his property without his consent, if the possession is converted into more than *prima facie* evidence of title. That the possession is coupled with a contract, by which, on the performance of a condition, the possessor can acquire title, cannot be material; for, if the purchaser from him has notice of the contract, he is without equity to protection against it; and if he has no notice, he is merely in the condition in which the most prudent have often been placed, purchasing property from one who has no title, or an infirm title.

It is a universal and fundamental principle of the law of personal property, that the owner shall not be deprived of his property without his consent, except by due process of law. "The maintenance of the principle," as was said by Justice FIELDS, in *Telegraph Co. v. Davenport*, 97 U. S. 372, "is essential to the peace and safety of society, and the insecurity which would follow from any departure from it, would cause far greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded."—*Saltus v. Everett*, 20 Wendell, 270; *Blackman v. Lehman*, 63 Ala. 547; *Leigh v. M. & O. R. R. Co.* 58 Ala. 165. Upon this principle rest numerous cases, to be found in the books, many of them seemingly hard and distressing, in which honest and innocent persons, trusting to possession as the evidence of ownership, have been compelled to yield to the true title, even though they were without remedy to recover the money paid, or the property with which they had parted.

It has been, for many years, a necessity here to make contracts for the purchase of personal property, dependent on the condition of paying the purchase-money. Such contracts are, and have been, of almost daily occurrence; and no greater insecurity in the transaction of business could be introduced, than would follow from a continued departure from the well-settled law affirming the validity of such contracts, and a continued adherence to the doctrine announced in *Sumner v. Woods*, and *Dudley v. Abner*, *supra*. Take this case

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as an illustration: a chattel of considerable value was sold; one-third of the purchase-money was paid in cash, and the remainder to be paid in equal installments, at four and six months, with a stipulation that the title was not to pass until full payment of the purchase-money. The contract is in writing, and it was made before the decisions were rendered in the cases referred to, and doubtless in reliance upon the rule, so well established by the great weight of authority. The contract was recorded; but the record, not being authorized by statute, does not afford notice to the world; and so it was claimed by the appellee, who purchased from the vendee, without notice of the contract by which he acquired possession. If the rulings of the Circuit Court are sustained, the vendor, against his consent, and when he had taken every precaution to avoid it, is deprived of his property, because the appellee purchased relying wholly on possession as evidence of ownership. The possession was merely *prima facie*, or presumptive evidence of ownership, and, without injustice, and introducing insecurity and uncertainty into the transactions of business, cannot be regarded and relied upon as evidence of a higher degree, divesting the true owner of his property.

The rulings of the Circuit Court are erroneous; and the judgment must be reversed, and the cause remanded.

## Gothard v. The Alabama Great Southern R. R. Company.

### *Action against Railroad Company to Recover Damages for Personal Injury.*

1. *Contributory negligence; rule as to defense of, stated.*—When contributory negligence is relied on as a defense to an action for damages, it is not essential that the plaintiff should have been the cause of the injury, for if his negligence contributed proximately to an injury which he could have avoided by the use of ordinary care or diligence, he can not recover.

2. *Same; when no defense.*—Although one negligently exposes himself to peril, yet, if he uses proper diligence in escaping the danger when it becomes apparent, and the defendant fails to use all the proper means in his power to avert the danger, the defendant is liable, and the original negligence is no defense to the action.

3. *Same; negligence to walk or drive on railroad track without looking out for trains.*—When, in an action against a railway company to recover damages for personal injuries, the evidence shows that the plaintiff placed himself in peril by driving his wagon and team on a crossing without looking out for approaching trains, at a place where his view was so obstructed that he could not

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see a locomotive which was approaching, and near at hand, and by which he was struck and injured, it is such negligence as precludes a recovery, unless the defendant could have averted the injury by the use of all means which were reasonably capable of adoption for the purpose.

4. *Negligence to run trains in a city at speed prohibited by ordinance.*—It is negligence to run a railway train within the limits of a city at a rate of speed which is prohibited by a municipal ordinance, but when the speed allowed by the ordinance was six miles per hour, and an accident occurred when a train was running at less speed than was prohibited, and the bell was being rung when an injury was inflicted, this would be, *prima facie*, the exercise of due caution.

5. *Case overruled.*—The case of *The Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437, so far as it conflicts with this case, is overruled.

### APPEAL from Jefferson Circuit Court.

Tried before Hon. W. S. MUDD.

On November 1st, 1878, Perry Gothard, driving his wagon along the most frequented street in the city of Birmingham, Ala., where the municipal ordinances prohibit the running of trains at a rate of speed greater than six miles per hour, came to a place where four railroad tracks which ran parallel to each other crossed the highway. As he approached there was a train backing along one of these tracks, which belonged to the South and North Ala. R. R. Co. He stopped to let this train pass, but did not get down from his wagon to look out for approaching trains. As soon as this train was out of the way a man on foot crossed the tracks, and Gothard started across without observing a train which was approaching at a speed, variously estimated by persons, at from five to ten miles per hour, on a track belonging to the Alabama Great Southern R. R. Co. This latter train was hidden from him by the backing train, until it was within about twenty feet of him. As soon as the men in charge of the train, which was concealed from him, saw him, they rang the bell, blew the whistle, put on the brakes, and "used all the appliances known to skillful engineers to avert the injury," but the locomotive struck Perry Gothard's wagon, turned it over; broke his thigh and permanently disabled him. At the time the accident occurred the bells on both engines, and they were dissimilar in their tones, were being rung. Gothard brought this action against the Alabama Great Southern R. R. Co., to recover damages for the injuries thus inflicted on him. On the trial of the case the facts as stated above were shown, and the court charged the jury, in writing, at the request of the defendant, that "if they believed from the evidence, that the agents of the defendants, who were operating the train that ran against and injured the plaintiff, were on the lookout and saw the wagon which plaintiff was driving, as soon as it was uncovered by the train on the South & North Ala. R. R., and after discovering the peril plaintiff was



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in, applied the brakes and reversed the engine, and used all means in their power, known to skillful engineers, to stop the train; and if the jury further believe, that defendant's train, at the time of the accident, was not running more than six miles an hour; and if they further believe that the bell of the engine was being rung, as testified by the witnesses, then the plaintiff cannot recover. To this charge the plaintiff excepted. 2. The plaintiff was bound to use his eyes and ears as far as there was opportunity, to discover and avoid danger, and if, by such use of his senses, he might have discovered and avoided the danger, but omitted to do so, and if such omission on his part contributed proximately to produce the injury complained of in this cause; and if, without such omission on his part, the injury would not have occurred, then, upon this state of facts, the plaintiff is not entitled to recover. The plaintiff, also, excepted to the giving of this charge. 3. The defendant was authorized by law, at the time the injury occurred, to run its train within the corporate limits of the city of Birmingham, and across Twentieth street in said city, at a speed not exceeding six miles an hour; and if, at the time of the accident, said train was being run at not exceeding six miles an hour, its being run at such speed was not negligence on defendant's part. To this charge plaintiff excepted. 4. Because of the character and momentum of defendant's train, the law will not require it to stop its train and give precedence to plaintiff's wagon, to make the crossing first; it was the duty of plaintiff to wait for defendant's train to pass before he attempted to cross; and if he could, by the exercise of due diligence, have discovered the approach of defendant's train; and if plaintiff attempted to cross in front of defendant's train, knowing of its approach, or if, by the exercise of due diligence he could have discovered its approach, he would be the author of his own misfortune, and could not recover in this action, unless the jury should believe, from the evidence, that upon the manifestation of plaintiff's peril, those who controlled plaintiff's train failed to use due diligence to prevent the injury, or unless the jury should believe that those who controlled defendant's train injured the plaintiff wantonly, recklessly, or intentionally. To this charge the plaintiff also excepted. 5. Although the jury may believe from the evidence, that the agents and employees of the defendant neglected to use due care and diligence to avoid the collision, this did not relieve the plaintiff from the necessity of taking due care and precaution for his safety. Before attempting to cross the railroad track he was bound to use his senses to look and to listen in order to avoid the accident in

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this case, from defendant's approaching train. If he omitted to use his sense of sight and hearing, and drove thoughtlessly on the track; or if, using them, he saw or heard the train coming, and instead of waiting for it to pass, he undertook to cross the track, he so far contributed to the injury complained of by him as to deprive him of any right to recover, unless you believe from the evidence that, upon the manifestation of plaintiff's peril, those controlling plaintiff's train failed to use due diligence to prevent the injury, or unless the jury should believe that those controlling defendant's train injured the plaintiff wantonly, recklessly or intentionally. To the giving of this charge the plaintiff excepted.

In connection with these charges the court, in explanation of them, charged the jury "that the law required of the defendant and its agents and employees, who were controlling the defendant's train that ran against and injured the plaintiff, that degree of diligence which very careful and prudent men take of their own affairs, and that the defendants and its agents and employees, shall employ their care and prudence actively, as very careful and prudent men watch over their own important interests and enterprises of similar magnitude and delicacy; that the law required of the plaintiff in attempting to drive his wagon across the defendant's track, at its intersection with Twentieth street in the city of Birmingham, ordinary care and diligence—only that care and diligence which an ordinarily careful and prudent man would exercise under similar circumstances." To this charge the plaintiff also excepted. There was a verdict for the defendant. The charges of the court, which are set out above in full, are assigned as error.

M. T. PORTER, and TERRY & LANE, for appellant.—The first and third charges are erroneous. It is the duty of those in charge of railroad trains to run them at such a rate of speed, when approaching public crossings, that they may control them speedily, and avoid collisions with persons and property. The observance of municipal and statutory requirements will not excuse from liability if in other respects there was a neglect of those precautions which ordinary prudence suggests as necessary to avoid accidents.—*South & North Ala. R. R. Co. v. Thompson & Garner*, 63 Ala. 494; *Memphis & Ch. R. R. Co. v. Lyon*, 62 Ala. 71; *S. & N. R. R. Co. v. Sullivan*, 59 Ala. 272; 46 Mo. 353; 50 *Ib.* 461. If the ordinance had prohibited the running of trains at a rate of speed greater than fifty miles an hour, could it be contended that it would not be negligence to run them at that rate over a street crossing, when those in charge of them could not see

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the crossing, and when the train could not be seen by persons at the crossing until it was within twenty feet of them.

The second, fourth, and fifth charges invade the province of the jury, to whom the question of negligence, *vel non*, should be left. The controlling principle extracted from the cases cited *supra*, is that railroad companies, in running their trains, shall keep them under reasonable control, and that what is reasonable control depends on the peculiar facts and circumstances of the case, and the jury must determine what is reasonable control. A train should be run at a less rate of speed in a city when approaching a crossing on a frequented street than on one which is unfrequented, and at a less rate of speed where the view is obstructed than where it is open and unobstructed.

HEWITT & WALKER, and RICE & WILEY, for appellee.—(No brief on file.)

SOMERVILLE, J.—In every action for damages, where the defense of contributory negligence arises, the question always to be determined is, whether the negligence of the plaintiff contributed proximately to the injury of which he complains. It is not essential that he should have been the *cause* of the injury. It is sufficient to defeat a recovery, if the plaintiff could have avoided the injury by the exercise of reasonable or ordinary care and prudence, unless, perhaps, in those cases where the misconduct of the defendant, which produces the injury, is wanton, reckless or intentional. Shearman & Redf. on Neg. § 34; Wharton's Law Neg. § 300.

The doctrine is properly stated by STONE, J., in *Tanner's Ex'r v. Louisville & Nashville R. R. Co.* 60 Ala. 621. The rule, as there settled, is, that although a plaintiff may be at fault in exposing himself to peril, yet if he uses proper diligence in escaping when the danger becomes apparent, and the servants of the company fail to use all the proper means in their power by the exercise of which the danger might be avoided, the railroad company is liable for the injury proximately produced, and the original negligence is no defense to the action.

The principle is stated as follows, in Field on the Law of Damages, § 170: "The plaintiff cannot recover, notwithstanding the negligence on the part of the defendant, if he has so far contributed to the accident, by the want of ordinary care, that but for that, the accident would not have happened; but, though the plaintiff has so contributed to the accident, he is not disentitled to recover if the defendant, by ordinary care, could have avoided the consequences of



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the plaintiff's neglect, and when, but for the plaintiff's negligence at the time, he might have escaped the consequences of the defendant's negligence, he cannot recover." This rule is correct as a general one, but more than ordinary care is required of those having the control of steam-engines and the management of railroad trains. The law exacts, in such cases, a care and diligence proportionable to the hazard of the enterprise, which has been declared by this court to be "that degree of diligence which very careful and prudent men take of their own affairs."—*Railroad v. Waller*, 48 Ala. 459; *Tanner v. Railroad*, 60 Ala. 621.

In the case at bar, as the evidence tends to show, the plaintiff placed himself in a position of great peril. He drove his wagon and team of oxen upon the crossing, when his view was so obstructed that he could not see the approaching locomotive, then very near at hand. It has been repeatedly held, that to walk or drive upon the track of a railroad without looking in both directions so as to discover approaching engines or trains, is such negligence as would preclude a recovery unless the defendant could have averted the resulting injury by the exercise of all the proper means, reasonably capable of adoption at the time.—*Railroad v. Hunter*, 33 Ind. 335; (5 Amer. Rep. 201); *Railroad v. Weber*, 76 Penn. St. Rep. 157; (18 Amer. Rep. 407). Many of the adjudged cases have gone so far as to hold, that where the approach to a railroad was dangerous, because the track could not be seen beyond the point of crossing, one failing to pause and listen, before attempting to cross the track, is guilty of such negligence, *per se*, as to preclude any recovery, and that the question of contributory negligence should not even be permitted to go to the jury.—Field on Damages, § 175, and cases cited.

In *Railroad Co. v. Godfrey*, 71 Ill. 500, it was said: "As a general rule, it is culpable negligence to cross the track of a railroad at a highway crossing, without looking in every direction that the rails run, to ascertain whether a train is approaching."—*Sherman & Redf. on Neg.* § 483, and note. The same court said, in *Railroad Co. v. Gretzner*, 46 Ill. 74: "If a party rushes into danger which, by ordinary care, he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care, and so must the other party."—*Railroad Co. v. Hail*, 87 Ill. 529.

The case of the *Pennsylvania Railroad Co. v. Beale*, 73 Penn. St. 304, was similar to the one under consideration. The line of the railroad was obstructed from the view of a traveler on a highway, who was approaching a crossing in a

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wagon. He failed to stop and look before he attempted to cross the track. It was held, that this was such contributory negligence as to defeat a recovery for the death of the traveler, which was produced by collision with a passing train at the crossing. It was his duty not only to stop, but to look and listen, using both his eyes and ears to discern approaching trains, and a failure to do so, the court said, was negligence *per se*.—*Railroad v. Hetherington*, 83 Ill. 510; *Railroad Co. v. Weber*, *supra*. The principle settled in this, and other like cases, may be taken as sound, with the qualification, that the defendant would, nevertheless, be liable if, by the exercise of reasonable care and proper prudence, the accident could have been avoided or the injury averted. *Button v. R. R. Co.* 18 N. Y. 240; *R. R. Co. v. McElmurry*, 24 Ga. 75; *Tanner v. Railroad*, *supra*; *S. & N. Ala. R. R. v. Thompson*, 62 Ala. 494.

The running of a railroad train within the limits of a city, at a rate of speed prohibited by its ordinances under a penalty, would constitute negligence.—*Correll v. Railroad*, 38 Iowa, 120, (18 Amer. Rep. 22). The evidence in this case showed that the speed permitted by an ordinance of the city of Birmingham, where the injury occurred, was six miles per hour. If the defendant did not exceed this rate of speed, and the engineer was ringing the bell at the time the locomotive was approaching the crossing, when the accident in question transpired, this would *prima facie* be an exercise of due caution in this particular regard.—Code (1876), § 1699. There was no evidence rebutting this presumption, or tending to show that the rate of speed permitted by the city ordinance was unreasonably fast, and not duly proportioned to the danger to be apprehended of inflicting injury upon others. The case of the *Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437, is hereby overruled so far as it is in conflict with this opinion, it being entirely opposed to the vast preponderance of authority.

The rulings of the Circuit Court were a clear recognition of the principles expressed in this opinion, and were, therefore, correct.

Judgment affirmed.

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## Brewton, Adm'r, v. Watson.

### *Statutory Real Action.*

1. *Statute of uses ; estates under may commence in futuro.*—In conveyances deriving their operation under the statute of uses, freehold estates may be made to commence in futuro ; a fee may be limited on a fee, or an estate may be limited to take effect in abridgment or derogation of a preceding estate.

2. *Deed ; instrument held not to be.*—An instrument which purports to be made in consideration that Mrs. W. will support Mrs. B. during the life of the latter, will pay her debts, and render certain other specified services for her, and bury her decently at her death, which is signed by both, and declares that on the performance of these conditions by Mrs. W. she shall have and be entitled at and after the death of Mrs. B., to all the property owned by Mrs. W., except certain furniture, "none of which is sold or contracted away by these articles of agreement," but which contains no words of grant or conveyance, is not a deed.

3. *Deed ; words of granting or alienation necessary in.*—Formal and technical words are not necessary in a deed to lands, and when an intent is manifested that the estate shall pass, the words will, if possible, be construed so as to take effect, but there can be no valid or operative conveyance of lands without some words of grant or alienation.

4. *Ejectment ; personal representative may recover in.*—When the legal title to land was in the intestate at the time of her death, the personal representative may recover in ejectment against one who holds possession of them under an agreement which entitles her, on performance of its conditions, to all the property owned by such intestate at the time of her death.

### APPEAL from Calhoun Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was a statutory real action in the nature of ejectment, brought by C. W. Brewton as administrator *de bonis non* of the estate of Mrs. E. A. Browning, deceased, against Mrs. Susan C. Watson, Robert Adams, and Clark A. Ledbetter, to recover a tract of land in Calhoun county, Alabama. The suit was begun on November 2, 1875, and on the trial it was proved that Mrs. E. A. Browning had been in possession of the lands sued for for thirty-five years, cultivating and exercising acts of ownership over it during all that time ; that Mrs. Browning died in 1873. It was admitted that M. J. Turnley had been duly appointed administrator of the estate of Mrs. Browning by the Probate Court of Calhoun county ; that he had resigned, and that Caleb W. Brewton had been appointed administrator *de bonis non* on said estate. The defendant having first proved its execution, offered in evidence the following instrument, viz. : "Articles of agreement made and entered into by and between E. A. Browning of the



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county of Calhoun and State of Alabama, of the first part, and S. C. Watson of the county of McDuffie, late Columbia, and State of Georgia, of the second part--witnesseth, that in consideration that the said S. C. Watson will remove from her present residence in Georgia, with her four children, and live in the dwelling house with the said E. A. Browning, in said county of Calhoun, and take the general superintendence of the farm and business of the said Browning, and will provide for and keep the said E. A. Browning, as to board and maintenance, and clothing, in a decent, comfortable manner suitable to her age, health and condition in life, and appropriate the proceeds of the said farm, all over what is necessarily consumed annually, to the payment of four several notes held by one M. J. Turnley against said E. A. Browning, amounting to about four hundred dollars, and any other debts that said Browning may owe, and treat said E. A. Browning kindly, and cause her children to do the same, the said E. A. Browning agrees that the said Susan C. Watson shall live with her said family with the said E. A. Browning in her dwelling, and shall have the general oversight and the management of said farm and business of said E. A. Browning, including her stock, and shall be entitled to appropriate the rents, profits and income of said farm and increase of the stock on hand, after supporting said Browning as herein provided for, and making such repairs upon the said farm and dwelling as may be necessary to the proper use and benefit of the said S. C. Watson; and the said Watson, upon the faithful performance of her part of this contract, shall have and be entitled to, at and after the death of E. A. Browning, all the property, both real and personal, now owned by said E. A. Browning, with the income and increase thereof, excepting the household furniture belonging to her, none of which is sold or contracted away by the articles of agreement. It is further agreed that at the death of said E. A. Browning, the said Watson shall give the said E. A. Browning a decent burial, suitable to her circumstances and condition in life, and the custom of the country at the time. And the said E. A. Browning also agrees to treat the said S. C. Watson and her children at all times with respect and kindness, suitable to their age and condition. In testimony," &c.

This instrument was signed in duplicate by E. A. Browning and Susan C. Watson. When the defendant offered to read this instrument to the jury the plaintiff objected, because: 1. It did not vest the legal title in the defendant; 2. Said instrument is not a deed to the land sued for. These objections were overruled and the plaintiff excepted. The

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defendant then introduced several witnesses to prove the performance of the conditions in the agreement, to which plaintiff objected, because this proof was irrelevant and did not tend to show title in the lands. These objections were overruled and plaintiff excepted. The court charged the jury: "If the jury believe from the evidence that the instrument of writing that is in duplicate was executed by Mrs. E. A. Browning and Mrs. S. C. Watson, and one duplicate was delivered to Mrs. Watson, this instrument is a deed, and divested the title to the land in controversy out of Mrs. Browning and invested title in Mrs. Watson, and the jury should find for the defendant." Plaintiff excepted to this charge.

2. The jury have nothing to do with any question or enquiry as to whether or not Mrs. Watson complied with or performed any stipulations or provisions contained in said instrument of writing in duplicate parts of the date of June 10, 1871, as the performance or failure to perform the stipulation contained in said instrument does not have any effect or influence on the title of the lands in controversy or the title of Mrs. Watson to the lands. To this charge the plaintiff excepted. There was a verdict for the defendants.

The giving of these charges, and the ruling of the court on the admission of evidence, as shown above, is assigned as error.

JOHN T. HEFLIN, for appellant.—The writing between Mrs. Browning and Mrs. Watson did not vest in the latter the title to the lands. At her death Mrs. B. held the legal title, and her administrator must recover in ejectment. The court erred in permitting the paper to go to the jury.—*McPherson v. Walters*, 16 Ala. 714; *Smith v. Munday*, 18 Ala. 185; *Bean v. Welser*, 17 Ala. 370; *Settles v. Hays*, 17 Ala. 749. This instrument shows that it was not intended as a deed, for a material stipulation—that of sepulture—is to be performed after the death of Mrs. Browning, and its operative words expressly provide that Mrs. Watson is to own the property on the faithful performance of her part of the contract, and this ownership is to attach after the death of Mrs. Browning. The parties to the instrument call it "articles of agreement," "a contract," and the instrument shows that it was not intended as a deed. At most Mrs. Watson could only go into equity, and on proof of the performance of the conditions in the agreement, establish title by the decree of the Chancery Court. She can not set up this equity to defeat an action of ejectment brought on the legal title.—*Nichols v. Harkins*, 58 Ala. 619. This instrument is only a will.—*Shepherd v. Nabors*, 6 Ala. 631; *Thompson v. Johnson*, 19 Ala. 59; *Walker*

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*v. Jones*, 23 Ala. 448; *Gilham v. Martin*, 42 Ala. 365; 42 Ala. 389; 13 Ala. 731. The court erred in the charges given.

WATTS & SONS, for appellee.—The instrument offered in evidence was a deed. It was signed, sealed and delivered in the life-time of Mrs. Browning, is on a valuable consideration, and conveys a present interest to Mrs. Watson.—*Wilks v. Greer*, 14 Ala. 437; *Summerlin v. Gibson*, 15 Ala. 406; *Thompson v. Johnson*, 19 Ala. 59; *Golding v. Golding*, 24 Ala. 122; 42 Ala. 589; 42 Ala. 365; *Gregory v. Walker*, 38 Ala. 26. There can be no reasonable doubt that it was the intention of Mrs. Browning, as is shown by the written instrument, to convey to Mrs. Watson the fee in the land subject to the conditions expressed therein. The words, though not technical, are construed most strongly against the grantor, and are sufficient to carry the fee.—*Patterson v. Carneal*, 3 A. K. Mar. 613; *Folk v. Varn*, 9 Rich.; S. C. 303; *Gambil v. Doe*, 8 Black, 140; *Gordon v. Haywood*, 2 N. H. 402. The testimony of the witnesses as to the performance of the conditions of the contract by Mrs. Watson, was proper to show that she had complied with its obligations, even if the court committed error in admitting or rejecting evidence. It is clear that the administrator of Mrs. Browning's estate can not recover on the facts disclosed in this case.

BRICKELL, C. J.—The important question of the case, which alone we deem it necessary to consider, is as to the character and operation of the instrument under which the appellees deduced title to the premises in controversy. If, as is insisted, it is a deed deriving operation from the statute of uses, it is not an objection to its validity that the estate of the grantee was not to arise and vest until the death of the grantor. In conveyances deriving their operation from the statute of uses, freehold estates may be made to commence *in futuro*; a fee may be limited on a fee, or an estate may be limited to take effect in abridgment or derogation of a preceding estate.—2 Green. Cruise, 136; *Horton v. Sledge*, 29 Ala. 478; *Simmons v. Augustine*, 3 Port. 69.

But is the instrument a deed, or a mere agreement by which it is stipulated that in consideration of the performance of its covenants on her part, Mrs. Watson was entitled to the possession, rents and profits, of the premises during the life of Mrs. Browning, and on the death of the latter, was entitled, if the covenants had been performed, to title, not only to the premises, but to all other estate of Mrs. Browning, than her household furniture? The latter is manifestly the character of the instrument, and if it is not so construed,



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the clearly expressed purposes of the parties could not be consummated. The instrument is styled *articles of agreement*, and purports to be made *in consideration* that Mrs. Watson will support and maintain Mrs. Browning during life, burying her decently at her death, performing other services for her, and would also pay the debts of Mrs. Browning, some of which are mentioned. It is signed by both parties, and is without a word of grant or conveyance. Taking the whole instrument together, the conclusion is irresistible that a covenant, upon the performance of which Mrs. Watson, during the life of Mrs. Browning, would be entitled to possession and to the rents and profits of the premises, and having performed, on the death of Mrs. Browning, should be entitled to the title, was intended, and not a grant or conveyance of the title to take effect *in futuro*. There can be no valid and operative conveyance of lands without some words of grant, or alienation. Formal, technical words, are not necessary; and when an intent that the estate shall pass is manifested, its words will, if possible, be so construed that it shall take effect. But the want of words cannot be supplied. The only words in the instrument which refer to the passing of title are, "and the said S. C. Watson, upon the faithful performance of her part of this contract, shall have and be entitled to, at and after the death of said E. A. Browning, all the property, both real and personal, now owned by the said E. A. Browning, with the income and increase thereof, excepting the household furniture belonging to her, none of which is sold or contracted away by these articles of agreement." These are words of covenant, of contract, not of conveyance.—*McKinney v. Settles*, 31 Mo. 541; *Chapman v. Glassell*, 13 Ala. 50; *Love v. Crook*, 27 Ala. 624; 3 Wash. Real Prop. 329.

The legal estate in the lands residing in the intestate of the appellant at the time of her death, entitles him to a recovery. If Mrs. Watson had fully performed the covenants of the instrument, in a court of equity she may compel a specific performance, obtaining the legal estate.

It is not necessary to point out the several rulings of the Circuit Court inconsistent with this view of the instrument. Because of them, the judgment is reversed and the cause remanded.

[Yniestra v. Tarleton et al.]

**Yniestra v. Tarleton et al.***Bill in Equity to Establish and Enforce Implied Trust.*

1. *Non-claim, statute of; exceptions in statute of limitations as to fraud, do not refer to.*—The provisions of § 3242 of the Code, that “an action may be brought at any time within one year from the discovery, by the aggrieved party, of the facts constituting the fraud,” do not refer to the statute of non-claim.

2. *Same; claims originated by fraud of deceased, barred by.*—A claim against the estate of a deceased person, originating in, or based on, his fraud or fraudulent concealment of the cause of action, is barred by the statute of non-claim, unless it is presented to his personal representative or filed in the office of the judge of probate, of the proper county, within eighteen months after the grant of letters testamentary or of administration.

3. *Same; demurrer to bill on ground of, when properly sustained.*—When a bill filed to enforce a claim against the estate of a deceased person, which it is alleged arose from a cause of action fraudulently concealed by him, shows on its face that such claim was not presented to the personal representative of his estate, nor filed in the office of the judge of probate, of the proper county, within eighteen months after the grant of letters testamentary or of administration, a demurrer on the ground that such claim is barred by the statute of non-claim, is properly sustained.

**APPEAL from Mobile Chancery Court.****Heard before Hon. JOHN A. FOSTER.**

This was a bill filed by Louisa Yniestra, on January 15, 1880, against Robert Tarleton and others, who were the heirs and devisees of Geo. W. Tarleton, deceased. The complainant alleged that she was married to B. F. Yniestra in Nov. 1857; that before her marriage she was seized and possessed of a lot of land in the city of Mobile, which is described in the bill, and on which there was a brick store-house; that she had derived this property from the estate of her father, and that after her marriage it became her statutory separate estate; that about the first of March, 1863, her husband borrowed from Geo. W. Tarleton, \$5,000 for the use of the mercantile firm of which he was a member; that, at her husband's request, she signed a note on said day for \$5,000, payable to Geo. W. Tarleton, and due March 1st, 1869, and also a mortgage on the said lot to secure its payment; that complainant was never indebted to said Tarleton, and never borrowed any money from him; that her husband, who had control of the property as her trustee, caused the store to be insured in the *Ætna Ins. Co.* for \$3,000, and caused the policy to be issued to him as “agent”; that while said policy was in force, namely, about the 11th of March, 1868, her husband trans-

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ferred the policy to G. W. Tarleton, and on each subsequent yearly renewal thereof, also assigned it to said Tarleton; that her husband always paid the premiums on the policy, and that he had always ample funds coming from her statutory separate estate, with which to do so; that about the 9th of December, 1870, the buildings on said lot were wholly destroyed by fire; that proper proofs were made, and the loss adjusted, and the whole amount of the policy, viz: \$3,000, was, without opposition from her husband, paid by the insurance company in March, 1871, to said Tarleton; that the proceeds of said insurance was the corpus of her statutory separate estate, and was paid to said Tarleton upon the assignment of the policy made to him by her husband; that said Tarleton had express notice from the public records of Mobile county, from the terms of the policy, and from his personal knowledge of the facts, that the policy was issued to B. F. Yniestra, as her agent, and on the property belonging to complainant; that all the foregoing facts were concealed from her by her husband, and by Geo. W. Tarleton, and that she learned them in the following manner: After the improvements on the lot were destroyed, and after the insurance money had been collected, without her knowledge, by G. W. Tarleton, she, in 1873, endeavored to sell the lot, but discovered that there was a mortgage on the lot, on record, in favor of said Tarleton, and then first discovered the true character of the instrument signed by her, in March, 1868. She then filed a bill on March 30, 1873, against her husband and G. W. Tarleton, in which she alleged the character of her estate in the lot, the origin of the debt, and the fact that she assumed it in ignorance of her rights, and the consequent nullity of the note and mortgage; but Geo. W. Tarleton, though duly summoned, did not appear and answer the bill, but permitted a decree *pro confesso* to go against him, and made no disclosure of the fact that two years before he had collected the insurance money, but purposely concealed this fact; and the bill then avers that in making such collection he was acting as her trustee, and had no right to apply the money in payment of her husband's debt to him; that the Chancery Court decreed the mortgage to be void, and directed it to be canceled. To all of which said Tarleton tacitly consented, designing to induce complainant to believe that he had abandoned any claim on her property, when he had already appropriated said insurance money; that the assignment of the policy was a nullity; that said Tarleton persisted in concealing the fact of the collection of the insurance policy until his death in May, 1874. The bill avers that complainant's husband had full control and manage-



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ment of her property till his death, which occurred in July, 1879; that 60 days before the filing of the bill, she discovered the facts from her attorney during the course of a consultation on other matters. The names of the devisees and legatees of G. W. Tarleton are then given, with their respective interest in the property left by him, and the bill prays that the insurance money collected by him, as aforesaid, may be declared a trust-fund; that a charge and lien may be declared on the whole estate of said G. W. Tarleton, remaining in the hands of the defendants, devisees under his will, and that the sum embraced in said trust fund be decreed to be paid to her out of the portions of said property that have come to the hands of said defendants.

The defendants answered, denying the material averments of the bill, and also interposed a demurrer on the ground that the claim which was sought to be enforced by the bill was barred by the statute of non-claim.

The Chancellor sustained the demurrer and dismissed the bill. This decree is assigned as error.

HANNIS TAYLOR, for appellant.

OVERALL & BESTOR, for appellee.

SOMERVILLE, J.—The pleadings, and ruling of the Chancellor on the demurrer to the bill in this case, raise the question, as to whether or not allegations of *fraud*, or *fraudulent concealment*, of a cause of action, averred in the bill, can operate to take the action out of the statute of *non-claim*. This inquiry has never before been decided by this court.

It is argued by appellant's counsel, that, under the provisions of section 3242 of the Code of 1876, the action can be brought at any time within one year from the discovery by the aggrieved party of the facts constituting the fraud, and that the bill in this case was, for this reason, filed within proper time.

The statute invoked for relief, (§ 3242 of the Code), has no reference to the statute of *non-claim*. It will obviously appear, from its context, that it was intended to apply only to prevent the bar of the statute of *limitations*. At common law, it was doubtful, amid the conflicting decisions, whether the time necessary to complete the bar would commence to run only from the discovery of the fraud, or whether a reasonable time thereafter should be allowed for bringing suit. In this state of the law, "one year" was prescribed by the legislature as the reasonable time within which the aggrieved party was required to prosecute his suit, when his

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relief was based on the fraud or fraudulent concealment of the defendant.—*Porter v. Smith*, (MSS., present term.)

The statute of *non-claim*, as found in the present Code, is in the following language: "ALL claims against the estate of a deceased person, must be presented within eighteen months after the same have *accrued*, or within eighteen months after the grant of letters testamentary, or of administration; and *if not presented within that time are FOREVER BARRED*.—Code, 1876, § 2597.

Section 2599 provides that presentation may be made either to the executor, or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate, in which letters were granted.

There are no exceptions to the universal operation of this statute, except in favor of minors, and persons of unsound mind, who are allowed eighteen months after the removal of their respective disabilities, and in favor of heirs or legatees, claiming as such.—(Code, § 2598.) "*All claims*" is a phrase clear and comprehensive, and must be construed to mean just what the words import. It does not mean all claims except a class not specified. It fails to make any exception of such claims, as the owner or holder may be ignorant of, or of such as may originate in, or be based on the fraud, or fraudulent concealment of the deceased. The remark of Lord Bacon embodies but a plain rule of construction, recognized every where in the common law, "that, as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated." The statute is unambiguous in its language, and plain in its literal meaning, and we do not feel authorized to incorporate in it a new exception, especially of this sweeping magnitude, without the sanction of the legislature.—*Carlisle & Jones v. Godwin*, (MSS., present term.) The following authorities show that, under our decisions and legislation, the statute of *non-claim* has never been regarded merely as a statute of *limitations*, but that the two systems have been recognized as separate and distinct, and embrace scopes of policy not commensurate, but, in many particulars, essentially diverse.—*Fretwell v. McLemore*, 52 Ala. 140; *McDowell's Adm'r v. Jones' Adm'r*, 58 Ala. 25; *Halfman's Ex'rs v. Ellison*, 51 Ala. 545; *Branch Bank v. Donelson*, 12 Ala. 742.

The further fact that the legislature have seen fit to apply section 3242 expressly to the statute of limitations, and have failed to indicate any intention that it shall have application to the statute of *non-claim*, is, to our mind, conclusive of the above view. There are many forcible reasons, derived from the policy and purposes of the latter statute, why, as to it,

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the exceptions should not prevail, and why it was, therefore, omitted with wise deliberation. To attempt to engraft it on the statute upon any principle of analogy would be a species of judicial legislation which we do not feel authorized to adopt.

The Chancellor correctly sustained the demurrer to appellant's bill.

These views render unnecessary the consideration of any other question raised by the record.

Affirmed.

## Porter & Co. v. Miles.

*Detinue to recover Steam Mill and Machinery by Material-man.*

1. *Lien of material-man ; character of, and how perfected.*—The lien given by the statute to material men, is neither a *jus in re*, nor a *jus ad rem*, but simply a right to charge the property affected by it with the payment of the particular debt, in preference and priority to other debts, on compliance with the requisitions of the statute ; and it is inchoate until perfected by the rendition of a judgment *in rem*, in the mode pointed out by the statute.

2. *Same ; what complaint in action to enforce must contain.*—In an action brought to enforce such a lien, the complaint must contain all the averments necessary to charge the debtor personally, and all the facts necessary to constitute the lien, and must describe the property sought to be charged.

3. *Same ; what judgment thereon must contain.*—The judgment in such action must correspond with the complaint, and though founded on a complaint containing all the necessary statutory averments, is insufficient to perfect the lien, if it be only a judgment in the ordinary form in a personal action.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

This was an action of detinue brought by Porter & Co. against Miles, to recover a steam saw mill and machinery. The defendant pleaded "*non detinet*." On the trial, it appeared that Bickford erected a steam saw mill at the mouth of "Dog river," near Mobile, and bought various articles of Porter & Co. to be used about the mill. On December 20th, 1877, Porter & Co. filed their claim for the purpose of asserting their lien thereon, and suit having been brought, judgment was rendered in their favor for the amount of the claim. The complaint avers, that the defendant was the owner of a steam mill and machinery, describes it and gives its location, avers that materials were furnished by Porter & Co. for its erection and equipment, and that these materials were so used ; that Porter & Co. filed their claim, in accordance with the



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statute, with the judge of probate of Mobile county; that it was a just and true account after allowing all off-sets and discounts, &c.; and avers that Porter & Co. have a lien on the mill and machinery under the statute. The judgment rendered in the case is in the ordinary form for a judgment by default in a personal action, with a writ of enquiry. An execution was issued on this judgment, which was levied on the mill and machinery. The property was sold under the execution and Porter & Co. became the purchasers. On the 9th of January, 1873, the Gulf City Foundry Company obtained a judgment against Bickford, under which the property in controversy was sold to the appellee, Miles, on the 6th of March, 1878. Miles went into possession of the property and held possession of it at the time Porter & Co. brought this action, viz: on February 20th, 1879. On the trial, the defendant insisted that Porter & Co. had included in their claim filed to assert a lien, articles for which the statute did not give a lien, and set out a number of them, but it is not necessary to set them out here. The court charged the jury, "that the right of lien extended to such materials only as ordinarily enter into, or are used in the construction of, such buildings, or improvements, as those on which the lien is claimed, and if they find from the evidence that the plaintiffs, in taking their judgment against Bickford, included in it any non-lien claims, that is, any claim for materials for which the law did not give them a lien, then as to plaintiffs' title, founded on their said judgment, they must find for the defendant; and in determining this question, they could look at the record in the suit of Porter & Co. against Bickford (which included the complaint and judgment), in connection with the other evidence in the case." The defendant excepted to this charge, and assigns the giving thereof as error.

THOS. H. PRICE, for appellants.—The sale under the execution vested the title to the property in Porter & Co. The lien under which the appellants claim relates back to the time when it was filed, viz: December 20th, 1877, and is superior to the right obtained by the defendant, (appellee), by virtue of the purchase at the execution sale made on March 6th, 1878. Section 3447 of the Code is confined to persons who acquired their interests before the proceedings to enforce the lien are commenced. Any other construction would destroy the value of the law, by destroying the conclusiveness of judgments rendered under it. Judgments on such lien laws are conclusive on parties and privies.—*Bowan v. McGloughlin*, 45 Miss. 461; *Phillips on Mech. Liens*, § 395.

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OVERALL & BESTOR, for appellee.—Appellee was not bound by the judgment rendered in favor of Porter & Co.—Code, § 3447. Hence he has the right to show that they had no valid lien. The judgment was by default, and Porter & Co. bought thereunder. They are therefore not *bona fide* purchasers for value. The validity of their title may be enquired into. *Freeman v. Cram*, 3 Coms. (N. Y.) 369; Phillips on Mech. Liens, 248.

As the judgment was by default and appellants purchased thereunder, they must show that it was founded on a valid mechanic's lien. The charge of the court was correct.—Code, § 3440; 34 Me. 373; 42 Me. 77; Phillips on Mech. Liens, §§ 151, 255; 11 Missouri, 271.

BRICKELL, C. J.—The only instructions of the Circuit Court to the jury, to which exceptions were reserved, refer to the operation and effect of the judgment in favor of appellants against Bickford, as declaring and establishing a statutory lien because of materials furnished by appellants for the erection of the steam-mill, which would be prior in point of time, and, of consequence, superior in right, to the lien of the execution in favor of the Gulf City Foundry Company, at a sale under which the appellee became the purchaser of the chattels. We shall not enter on the inquiry, whether a statutory lien can be acquired on chattels, which will follow them when dissevered from the freehold, or from the *buildings, erections, or improvements*, into which they may have been introduced. If it is conceded that such a lien may be acquired, it is by force of the statute only; and to its creation, preservation, and enforcement, a strict compliance with the statute is essential. The lien is not property, or a right in or to property: it is neither a *jus in re* nor a *jus ad rem*. It is simply a right to charge the property it affects, with the payment of the particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed. Of itself, when the statutory requisitions to its creation are observed, it has not the force and effect of a judgment, and is not *self-enforcing*, or *self-executing*. Until a judgment is obtained, in the mode pointed out in the statute, it is inchoate; and it is as dependent, for operation and effect, upon the rendition of a judgment, as the statute directs, as is the lien created by the levy of an attachment upon the rendition of judgment in the attachment suit.—Phillips Mechanic's Liens, § 9.

To render the lien effectual, the statute provides a suit at law, as in ordinary civil actions, with these exceptions. The complaint must not only allege all the facts necessary to

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charge the debtor personally, but it must also aver the facts necessary to secure a lien, and a description of the property to be charged therewith. Not only the parties to the contract, but all persons having an interest in the matter of controversy, or in the property to be charged, may be made parties; the proceedings binding only such persons as are made parties. The judgment, if it is to operate otherwise than as *in personam* (upon the person of the debtor),—must describe the property charged with its payment, and direct that it be levied of such property. The execution, issuing on it, is a *special fieri facias*, conforming to it.—Code of 1876, §§ 3446–47–50–53. The judgment contemplated by the statute, so far as it declares, establishes, and authorizes the enforcement of the lien, is a judgment strictly *in rem*. It is the liability of the property which is fixed—the charge upon it which is intended to be enforced.—*Ravies v. Stoddart*, 32 Ala. 603.

It may be true that the complaint, in the action commenced by the appellants against Bickford, avers all the facts necessary to the creation of the statutory lien, and that upon proof of these facts a judgment ought to have been rendered as the statute directs, under which the lien could have been enforced. The judgment rendered, however, was *in personam* only, and not *in rem*. The property to be charged is not mentioned or described in it, nor any reference made to it; nor has it any element, or characteristic, which can distinguish it from an ordinary judgment *in personam*, rendered in an ordinary action *ex contractu*. There is nothing attaching it to the property described in the complaint, or to any particular property of the defendant. A special *fieri facias*, the remedy for the enforcement of the statutory lien, could not issue upon it. Such a writ would not conform to, but would be an unwarranted departure from it. It is apparent, therefore, that the lien claimed by the appellants under the statute, is not established by this judgment, and if, when established, it would have precedence over the lien of the execution under which appellee deduces title, the precedence is dependent upon a judgment which has not been obtained. Consequently, if there was error in the instructions given the jury (which we incline to the opinion are correct), it was error without injury to the appellants.

Affirmed.



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## Mobile Life Insurance Company v. Egger.

*Action on Common Counts, with a Count on a Special Contract.*

1. *Books; statements from, not evidence.*—Statements of a witness, derived, not from personal knowledge of the matters testified about, but from an inspection of the books of an insurance company, are not legal evidence.

2. *Notice to produce papers, insufficient.*—A notice to the plaintiff to produce on the trial letters received in answer to letters written on his behalf by "P.," will not render admissible proof of the contents of letters written to "P." This would be to admit secondary evidence of the contents of letters without proof of their loss or destruction, and without any proper predicate for its introduction.

3. *Res inter alios acta; rule applied.*—The amount of money received by an insurance company for a paid-up policy, which another insurance company had bought from the assured, partly for money and partly for other insurance to be taken out in the latter company, is *res inter alios acta*, and furnishes no criterion of the measure of the liability of the latter company, in a suit by the assured, to recover on a failure to issue him a policy, or to pay him the agreed value of the paid-up policy.

4. *Sworn plea; when necessary to let in defense of plaintiff's want of interest.* When a complaint contains a count on a written contract in which the name of the plaintiff appears as one of the parties, there must be a sworn plea interposed denying the interest or ownership of the plaintiff, in order to let in the defense that the plaintiff is not the person really interested.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

This was an action brought by John Egger against the Mobile Life Insurance Company. The complaint contained the common counts, and a special count on a contract between plaintiff and defendant, the terms of which are given below. The defendant pleaded "in short by consent"—1. The general issue; 2. Payment; 3. Set-off. Before the trial the defendant notified plaintiff's attorneys to produce on the trial of the cause the letters received in answer to several letters written by A. C. Pickens. This notice is set out in full in the opinion of the court, and it is not necessary to repeat it here. On the trial the deposition of the plaintiff was read in evidence, and on this he rested his case. He testified that he was insured in the North America Life Insurance Company prior to the 18th of December, 1875; that up to October, 1872, he had a policy on his life for \$10,000; he then wrote the company asking them to pay him cash for his policy. The president of the company wrote to him to send his receipts, which he did, and thereupon he received from him

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a paid-up policy for \$1,428, without any explanation. In January or February, 1873, he had an interview with the president of the company and again requested him to cash his policy. He was offered about four hundred dollars, which he declined. In the summer of 1873 an agent of the Mobile Life Ins. Co. proposed to buy his policy for \$300. He accepted this offer, but the agent wrote to him that there was a note of \$100 due by him to the North America Life Ins. Co., which he must be allowed to deduct from the \$300. Plaintiff declined to allow this, as he understood the note was settled when he received the paid-up policy for \$1,428, in lieu of his policy for \$10,000. He had never been informed that this note had not been deducted, and this was the first notice he had ever received of it. In December, 1875, another agent of the Mobile Life Ins. Co., A. C. Pickens, offered to buy his policy and to pay him \$300 in cash for it, or to pay him \$150 cash and \$157.27 as premium on a policy of \$2,000, to be taken out by him in the Mobile Life Ins. Co., and if the policy was not granted he would pay him \$157 in addition to the cash payment. He accepted this offer, and the agent gave him a receipt, which was as follows, viz: "No. 5. Mobile Life Ins. Co. of Mobile, Ala. Montgomery, Ala., December 18, 1875. Received of John Egger, of Montgomery, State of Alabama, the sum of one hundred and fifty-seven and 27-100 dollars, the first twenty months premium on a policy of \$2,000. Applied for through his application to the Mobile Life Insurance Company of this State. The conditions of this receipt are that the said application is subject to acceptance or rejection upon its receipt by said company. If accepted the risk of the policy is binding on the company from the date hereof; if rejected, then this receipt to be null and void and the policy to have no binding effect on the said company by reason of said application or payment, except that the cash above received shall be refunded, upon the return of the receipt. A. C. Pickens, agent."

The defendant offered in evidence the depositions of C. P. Griffin, G. L. Montague, and H. P. Pierson. Plaintiff objected to the reading of the answers of Griffin and Pierson, to interrogatories which called on them to state what they knew about the note for \$100, referred to above, and in answer to which, they stated what appeared on the books of the North America Life Ins. Co., in reference to a note of the same amount and date as the one which was mentioned in the interrogatories, and the court sustained the objection and excluded such answers, except part of an answer, which stated that this note was paid by the Mobile Life Ins. Co. by deducting the amount thereof, with accrued interest, from

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the surrender value of said policy No. 31,788; and about January 13, 1876, at which date said policy was surrendered to the North American Life Ins. Co.; and the said note was then transferred and delivered to the Mobile Life Ins. Co. The court sustained the objections, and defendant excepted. H. M. Friend, a witness for the defendant, and its secretary, testified that in December, 1875, he received an application through A. C. Pickens, an agent for the company, for policy of \$2,000 on the life of John Egger, and at the same time received a paid up policy for \$1,428 in the North America Life Ins. Co., and a receipt from Leontine Egger, wife of John Egger, surrendering said policy. On the same day he paid a draft drawn on the company by A. C. Pickens in favor of plaintiff Egger for \$155; that he forwarded to the North America Life Ins. Co. the paid up policy for \$1,428, together with the surrender receipt therefor, and received from the North America Life Ins. Co. the note for \$100, with the accrued interest, amounting to \$124. Plaintiff's counsel objected to any statement by witness of the amount of cash received by the North America Life Ins. Co. for the policy. The objection was sustained, and defendant thereupon duly excepted. A. C. Pickens testified that in 1875 he was an agent of the Mobile Life Ins. Co. and was authorized by it to buy, or take up paid-up policies in the North America Life Ins. Co., by paying holders of the policies in cash, and giving them insurance in the Mobile Life Ins. Co.; that he went to plaintiff, and having found that the amount due on his paid-up policy as a reserve was about \$310, asked him to surrender his policy and make application for a policy for \$2,000 in the Mobile Life Ins. Co., telling him if he would do so, that he would pay him \$155 in cash, and give him a policy for \$2,000 in the Mobile Life Ins. Co., with a receipt for a premium on it for twenty months, if his application should be accepted. This premium amounted to \$157.27. Plaintiff accepted this proposition and handed him his paid-up policy and a surrender of it signed by Leontine Egger, in whose favor it was issued. He then paid plaintiff \$155 in cash and gave him the binding receipt, (set out above). He sent the policy, the surrender receipt, and the application of plaintiff to H. M. Friend, secretary. He stated, also, that at the time he made this contract he knew nothing of the note for \$100 held by the North America Life Ins. Co. against John Egger, who had said nothing to him about the note. Afterwards, on hearing of the note, he offered plaintiff the policy in the Mobile Life Ins. Co. if he would pay the note, which plaintiff declined to do. He then offered to return to plaintiff his paid-up policy in the North America Life Ins.



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Co. if plaintiff would return the binding receipt, and the sum of \$155, but the plaintiff declined to do so. The defendant requested the court to charge the jury, "that if the surrender value of the paid-up policy in the North America Life Ins. Co., which was surrendered by Leontine Egger to the Mobile Life Ins. Co., was paid by said North America Life Ins. Co. in the State of Alabama, where said J. Egger and Leontine Egger were domiciled, it then became personal property in the State of Alabama, and is governed by the laws of Alabama, and is the statutory separate estate of the said Leontine Egger, and she must sue alone for it, and the plaintiff can not recover in this action. The defendant then asked said Pickens about the letters written in 1876, as stated in the opinion of the court. Plaintiff objected to this question on the ground that proper notice had not been given to produce them. The court sustained the objection, and defendant excepted.

2. If the defendant was legally liable on the binding receipt for the full amount of \$2,000 insured therein, and the plaintiff refused to rescind the contract upon application to him for that purpose, then the plaintiff has received full value for his money, and can not recover back the premiums paid for said twenty months of insurance.

3. If the plaintiff J. Egger committed no fraud in his negotiation with the agent, A. C. Pickens, and the contract was fairly made and mutually assented to, by said Pickens acting for the Mobile Life Ins. Co., and said Egger, acting for himself, then said contract was valid, and said Mobile Life Ins. Co. was liable on said binding receipt for the full amount insured thereby during the full period of twenty months. The court, refusing to give these charges, the defendant excepted.

There was a verdict and judgment for the plaintiff. The rulings of the court on the evidence, and the refusal to give the charges requested by defendant, are assigned as error.

TAYLOR AND MACARTNEY, for appellants.

G. L. SMITH and G. F. MOORE, for appellees

STONE, J.—The Circuit Court did not err in suppressing parts of the depositions of the witnesses Griffin and Pierson. The answers suppressed were not given on knowledge, but were simply statements by the witnesses of what the books contain. They are not legal evidence.—*Crawford v. Br. Bank Mobile*, 8 Ala. 79; *Weeden, Adm'r Acklen v. Hickman*, at last term.

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The defendant had, before the trial, served notice on the plaintiff to produce on the trial "the letters received in answer to several letters written by A. C. Pickens, Esq., for and in behalf of Mr. John Egger to the North America Life Insurance Company of New York, in relation to a note of \$100, dated at New York, July 22d, 1878, and payable sixty days after its date to the order of the North America Life Insurance Company. Said letters are not less in number than two, nor more than four, and were written between the dates, January 25th, 1876, and April 1st, 1876." It will be observed that this notice called for the production, not of letters written to the North America Life Insurance Company. The demand was for letters written in reply to such letters. The notice did not call for the production of letters to the North America Life Insurance Company; and if it did, there is neither presumption nor proof that such letters ever went into the hands of Egger, the plaintiff. Pickens was on the stand as a witness, and was asked by defendant "about the contents of certain letters written in the spring of 1876 to the North America Life Insurance Company, in relation to said note of \$100 of John Egger." The bill of exceptions then states in parentheses, as follows: "(Which letters were exhibited to, and read by said John Egger before they were mailed, and the answers to which were handed to said John Egger.)" This was an offer to prove the contents, not of the reply letters the notice called for, but of the letters written to the North America Life Insurance Company. This was only secondary evidence of the contents of letters, with no predicate for its introduction, not covered by the notice to produce, and not shown to be material. The letters not being traced to, nor presumed to be in Egger's possession, their production was the highest and best evidence of their contents; and proof of their loss or destruction was a necessary preliminary to all evidence of their contents. In any aspect, this evidence was properly excluded.

The amount of money received on the policy by the defendant company from the New York company, was no proper criterion which defendant could invoke, as defining the measure of its liability to Egger. It was *res inter alios*; and it is not shown Egger had any thing to do with the settlement made. Defendant might accept less than was due, and could not, on that account, hold Egger to account for the deficiency.

The rulings of the court raise no question on the plea of set-off.—Code of 1876, § 2996.

In the complaint in this cause there are common counts, but there is also a special count on what is called the binding

[Sumner v. Woods.]

receipt. That receipt is also a contract to repay the money on a certain contingency, which the complaint avers has happened. This receipt and contract is in the name of plaintiff, and purports to be a contract made with him alone. To let in the defense that John Egger, the plaintiff, is not the party really interested in the contract, and therefore not entitled to sue, the defendant must have put in a sworn plea, denying such intent or ownership, under Rule 29, of practice in the Circuit Court. The Circuit Court committed no reversible error in its rulings on John Egger's right to maintain this suit. Whether the money was the statutory separate estate of Mrs. Egger, or not, was wholly immaterial under the pleadings in this cause, and therefore appellant can not complain of the rulings on that question. They did him no injury. The last two charges asked were rightly refused. The Mobile Life Insurance Company bound itself to issue to Mr. Egger a policy for two thousand dollars, or, failing, to refund the money. Refusing to do the former, it bound itself to do the latter.

Affirmed.

## Sumner v. Woods.

### *Detinue for a Sewing Machine.*

1. *Conditional sale; contract held to constitute.*—A contract under which a chattel is delivered to one who executes four promissory notes, to three of which is attached the condition, that the specific chattel "for the use of which to the maturity thereof the notes are given," is and shall remain the property of the payee of the notes, to whom it shall be returned in case of default in payment of the notes, and who agrees, in a condition attached to the fourth note, that "on payment of all the notes, the chattel shall become the property of the payor," does not create a chattel mortgage or a bailment, but is a conditional sale.

2. *Same; right of vendor to recover against innocent sub-purchaser.*—A purchaser of personal property from one holding possession under such a conditional sale, acquires only the conditional title of his vendor, and cannot defeat a recovery in detinue brought by the original vendor, even though he shows a *bona fide* purchase for value and without notice.

3. *Cases overruled.*—The statement in *Sumner v. Woods*, 52 Ala. 572, as to the rights of a *bona fide* purchaser of the property in controversy here, is a mere dictum, that is contrary to the weight of authority and to the previous decision of this court in *Holman v. Lock*, 51 Ala. 287. That case, and the case of *Dudley v. Abner*, 52 Ala. 572, so far as they conflict with the principles decided in this case, are overruled.

APPEAL from the Circuit Court of Calhoun.  
Tried before Hon. W. L. WHITLOCK.



[Sumner v. Woods.]

On January 22d, 1873, Sumner, the appellant, delivered a sewing machine to J. W. Smith, taking from him four promissory notes, payable at four, eight, twelve and eighteen months after date. To three of these notes a condition was attached, which was as follows: "It is agreed between the maker of this note and A. Sumner, that the Wheeler & Wilson Sewing Machine No. 695,688, for the use of which to the maturity thereof this note is given, is and shall remain the property of A. Sumner; and in default of payment thereof, said machine shall be returned to said Sumner, his agent or attorney." The condition attached to the fourth note was as follows, viz: "It is agreed between A. Sumner and the maker of this note, that the Wheeler & Wilson Sewing Machine No. 695,688, for the use of which to the maturity thereof this note is given, shall, upon the payment of this and all four notes given for the use of said machine, become the property of the maker of this note." The notes were not paid. In 1873, Bill Wood, who had no notice of Sumner's claim, bought the machine from one Dunn, who claimed to own it and who had it in his possession. He paid Dunn sixty-five dollars in cash for it. Sumner demanded the machine of Wood, who refused to give it up; and he thereupon brought this action of detinue to recover it. The court, of its own motion, charged the jury, that if they believed from the evidence "that the defendant, Bill Wood, purchased the machine in dispute from Dunn, and paid sixty-five dollars cash therefor, and that he had no knowledge or notice that the plaintiff had any claim against the machine, that the defendant would be an innocent and *bona fide* purchaser without notice and for a valuable consideration, and plaintiff could not recover; and that if plaintiff delivered the machine in controversy to the purchaser under the notes read to the jury, it was a waiver by the plaintiff to the right to the performance of the condition precedent in said contract mentioned, and plaintiff could not recover." There was a verdict for defendant. The charge of the court and the rendition of judgment in favor of appellee is assigned as error.

M. J. TURNLEY, with whom was CLOPTON, HERBERT & CHAMBERS, for appellant.—The contract in this case was either a bailment—a *locatio rei*—or it was a conditional sale. Sumner never parted with the title to the property, but, on the contrary, expressly stipulated that it should remain in him until payment of the notes. He can, therefore, recover the machine wherever found, even in the hands of an innocent *bona fide* purchaser without notice.—40 N. Y. 314; 15 N. Y. 409; 32 Me. 164; 55 Me. 113; 8 N. H. 325; 42 N. H. 386;

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8 Vt. 203; 4 Vt. 203; 14 Vt. 367; 18 Vt. 182; 41 Vt. 131; 3 Gray, 545; 8 Gray, 157; 15 Gray, 225; 2 Pick. 512; 4 Mass. 405; 98 Mass. 144; 15 Conn. 384; 24 Conn. 427; 29 Conn. 51; 15 B. Mon. 555; 4 Iredell, 48; 10 Iredell, 176; 12 Iredell, 268; 9 Ala. 25; 23 Ga. 200; 13 Ill. 614; 32 Ill. 411; 36 Mo. 419; 4 Mo. 326; 36 Cal. 151; 10 C. B. (Eng.) 381; 17 Tex. 661; 8 Iowa, 331; 9 Iowa, 91; 15 Iowa, 227; 1 Wis. 14; 9 Wis. 152; 3 Head, 84; 7 Yerg. 497; 11 Humph. 50; 3 Sneed, 524; 4 Sneed, 237; Story on Sales, 313. This question was not properly before the court when this case was formerly decided here. The case in 14 Serg. & Rawle can not outweigh the numerous authorities we have cited above. Possession is only *prima facie* evidence of title, which may be rebutted by sufficient proof. The report of this case in 52 Ala. 94, commits the court to a position which we contest. The doctrine in regard to the protection of *bona fide* purchasers for value and without notice, is not applicable to cases like this, and the court erred in its charge.

W. H. FORNEY, for appellee. (No brief on file).

SOMERVILLE, J.—In *Sumner v. Woods*, 52 Ala. 94, the written contract between the appellant, Sumner, and the appellee, Woods, was construed by this court, when the case was here once before this, on appeal. It was there properly declared to be a conditional sale, and not a mere bailment, or chattel mortgage. The question as to the rights of a *bona fide* purchaser of the property in suit did not properly arise in that case, and was unnecessarily stated, being a *dictum* uttered without proper consideration, and entirely opposed not only to the weight of authority, but to a previous decision of this court, in *Holman v. Lock's Adm'r*, 51 Ala. 287, where it was expressly held, that, in a case of conditional sale, the title under the terms of the contract remaining in the vendor until payment of the purchase-money, the conditional vendor of a horse could recover in trover against a mortgagee without notice.

In *Dudley v. Abner*, 52 Ala. 572, Mr. Justice MANNING held such a contract to be a parol chattel mortgage, void as to *bona fide* purchasers and creditors of the vendee under the influence of our statutes requiring conveyances of personal property to be recorded in the office of the judge of probate. The other two judges concurred in the view, that the transaction was a conditional sale, void as against *bona fide* purchasers without reference to the registration laws.

In view of this conflict between the past adjudications of

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this court, we feel impelled to follow the weight of authority, which is in full accord also with the weight of reason.

We consider it settled by an overwhelming preponderance of the decisions, that, where there is an express stipulation in the sale of personal property, that the property shall not be the vendee's until the price is paid, the title does not pass, the transaction being a mere conditional sale. And that a *bona fide* purchaser of such property acquires only the conditional title of his vendor, and cannot be protected against recovery on suit brought by the original vendor and owner of the legal title. The fact that the first purchaser, or second vendor, was at the time of sale in possession of the property does not change the principle. It is a question of right and not notice, and the maxim of *caveat emptor* applies with as much force as in cases of ordinary bailments. The principle, of course, does not obtain where the condition has been expressly or impliedly waived by the vendor, or he has done or suffered anything by reason of which the purchaser from the vendee has been misled.—Benj. on Sales, § 320, note (d); *Ketchum v. Brennan*, 53 Miss. 596; *Ballard v. Burgett*, 40 N. Y. 314; *Bigelow v. Huntley*, 8 Vt. 151; *Sargeant v. Metcalf*, 5 Gray, 506; *Hart v. Carpenter*, 24 Conn. 427; *Price v. Jones*, 3 Head, (Tenn.) 84; *McFarland v. Farmer*, 42 N. H. 386; *Griffin v. Pugh*, 44 Mo. 326; 1 Pars. on Cont. 537, and notes; Story on Sales, § 313; 2 Kent, 768-9; *Bailey v. Harris*, 8 (Clarke), Iowa, 331; *Jowers v. Blandy*, 58 Ga. 379; *Carroll v. Wiggins*, 30 Ark. 402; 5 Waite's Act. and Def. p. 547, § 15.

Holding these views, we feel constrained to overrule the conclusions reached in *Sumner v. Woods*, 52 Ala. 94, and in *Dudley v. Abner*, 52 Ala. 572, so far as those cases conflict with the above well established principle, as once before decided by this court in *Holman v. Lock's Adm'r*, 51 Ala. 287, which latter case has never been expressly overruled.

The charge given by the court below was erroneous, and the judgment is reversed and the cause remanded.



[Lewis v. Ford.]

## Lewis v. Ford.

### *Bill in Equity to Charge Debts of Testator on Property Devised to his Wife.*

1. *Charge of debts on devised property; certain words create.*—A clause in a will in these words: “I desire all my just debts and funeral expenses to be paid as soon after my decease as practicable,” would, according to the doctrines of English equity jurisprudence, create a charge by implication, on property devised by the will.

2. *Same; doctrine not recognized in Alabama.*—But this doctrine being opposed to the spirit and policy of our statutes, which expressly charge the whole property of every decedent with the payment of his debts, and vest the Probate Court with plenary power for subjecting such property to their speedy satisfaction, is not of force in this State.

3. *Same; how charged to prevent bar of statute of limitations from attaching.* There must be words in the will creating a specific charge or an express trust, to take a debt out of the operation of the statute of limitations, and no charge raised by implication will do so.

4. *Statute of limitations; suspended on death of debtor.*—On the death of the debtor the operation of the statute of limitations cannot be stayed or suspended longer than six months (Code, § 3244), without regard to the time when administration is granted on the estate.

5. *Estoppel not created against widow by payment on debt of intestate by her.* Where a testator devised his lands to his widow, and she, without taking out letters testamentary or of administration on his estate, recognized a debt as valid and subsisting against his estate, and made partial payments on it; held, that this did not estop her or her personal representative from pleading the statute of limitations in bar of an action by the creditor.

### APPEAL from Mobile Chancery Court.

Heard before the Hon. H. AUSTILL.

Reuben Whatley, being indebted to Edward A. Lewis in the sum of \$606, executed his promissory note for that amount on the 12th of August, 1865. The note was payable to Lewis, and became due twelve months after date. On the 17th of October, 1865, Reuben Whatley died, leaving his wife Sarah, and one child, Reuben, surviving him, and by his last will, which was duly probated, he gave all his property to his wife, who took possession of it and held it as her own until her death in 1876. After the death of R. Whatley, his wife married the appellee, Ford. Mrs. Whatley did not take out letters testamentary under the will, but she paid off all the debts on the estate except the one due Lewis, and on this she made several partial payments, viz: one of a hundred dollars on the 18th of March, 1860; one of a hundred and fifty dollars on the 11th of January, 1871; one of three hundred dollars on the 13th of March, 1873. She also sold

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a considerable portion of the property of the estate, both real and personal. After Mrs. Ford's (Whatley's) death, her husband, Richard Ford, administered on her estate and took charge and possession of all the property left by her first husband, Whatley, as part of her estate. The will of Reuben Whatley contained these words: "I desire all my just debts and funeral expenses to be paid as soon after my decease as practicable." Appellant, Lewis, filed this bill on the 25th of April, 1877, averring these facts, and insisting that, by the words quoted above, the testator had charged his property with the debt due him, and prayed that the real estate should be subjected to its payment. The defendant set up the statute of limitations of six years, as a bar to complainant's right to recover, and the Chancellor held that the claim was barred by the statute of limitations of six years, and dismissed the bill. His decree is assigned as error.

E. S. DARGAN, J. T. TAYLOR, and WATTS & SONS, for appellant.—The testator charged his property with the payment of his debts. The words of the will, "after payment of my debts," are equivalent in meaning to saying that "I give and bequeath my property subject to the payment of my debts." Mrs. Whatley having received the property in this way became the payor of the debt, and became personally liable to the creditors.—*Branch, Sons & Co. v. M. & W. R. R. Co.* 59 Ala. 139; 2 Paige, 15; 6 *Ib.* 387; *Harris v. Fly*, 7 *Ib.* 421; 11 *Ib.* 334; 3 Gratt. 148.

But the property of a decedent is held by his administrator or legatee, or devisee, in trust, for the payment of debts. *Dunlap v. Newman*, 47 Ala. 429; 1 Story's Eq. J. 546, 828; 2 *Ib.* 1250, 1251; and a simple contract creditor may come into equity to subject the property to the payment of his debt without having to resort to a court of law in the first instance.—*Ex parte Walker*, 25 Ala. Mrs. Whatley having elected to take the property under the will, and being the sole legatee and devisee, the only person whose rights could be affected, her acts in paying part of the debt due to appellant should bind the administrator of her estate, who can stand on no higher ground than she occupied.

She recognized the trust and the administrator can not now repudiate it for her. This case is wholly unlike the cases of *Currington and Manning*, 13 Ala.; and *Steele v. Humes*, and *Scott v. Ware*, 65 Ala. In each of these cases there was a personal representative, and there was no obstacle to a suit at law; here, however, the sole person whose rights were to be affected did not qualify as the personal representative, although recognizing the trust under which she took the

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property. The decree of the Chancellor was erroneous, for the statute of limitations could not run against a creditor and in favor of one holding property under such circumstances.

McKINSTRY & SON, for appellee.—(No brief on file.)

SOMERVILLE, J.—This is a bill filed by the appellant, Lewis, for the purpose of charging a debt of the testator, Reuben Whatley, upon certain property, real and personal, which had been devised by will to his wife, Sarah Whatley. The latter subsequently married the appellee, Ford, who, after her death, became her executor.

The Chancellor held that the claim of appellant, which was an unsealed promissory note, was barred by the statute of limitations of six years; and this is conceded to be the main question raised by assignment of error, for the consideration of the appellate court.

The charge is sought to be fastened on the property through the first item of the will, which reads as follows:

*"I desire all my just debts, and funeral expenses, to be paid as soon after my decease as practicable."*

It may be conceded, that this clause of the testator's will, according to the prevailing doctrine of English equity jurisprudence, would create a charge by implication on the property, which went into the hands of the devisee, under the provisions of the will.—2 Story's Eq. Jur. § 1246.

But this doctrine is not recognized as being of force in this State, having been held to be opposed to the spirit and policy of our statutes, which expressly charge the whole property of every decedent with the payment of his debts, and vest the Probate Court with plenary power for subjecting such property to their speedy satisfaction.—*Carrington & Co. v. Manning's Heirs*, 13 Ala. 611, (Opinion of CHILTON, J.); *Steele v. Humes*, 64 Ala.

There is, therefore, no such lien or charge created by the will as to arrest the running of the statute of limitations. No charge raised by implication, would have operated to do so, even under the English doctrine. To take the debt in question out of the operation of the statute, it would require in the will words creating a *specific charge*, or an *express trust*. 2 Story's Eq. Jur. § 1521; *Carrington & Co. v. Manning's Heirs*, *supra*.

It is, also, argued in this case, by appellant's counsel, that the statute of limitations was suspended, by reason of the fact that no letters testamentary, or of administration, were issued on the estate of Reuben Whatley, and there was no one in existence who could be sued on the debt.



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The construction put by this court on section 3244 of the Code (1876), is a full answer to this suggestion. In *Pickett, Adm'r, v. Hobdy, Adm'r*, 63 Ala. 609, it is held that, without regard to the time when administration is granted, the operation or running of the statute cannot be stayed longer than the period of *six months*. And this construction seems to us to be in perfect harmony with the wise policy for which this statute of repose was originally enacted. The breeding of law suits, springing from stale demands, is injurious to the good order of society and the best interests of every commonwealth.

It is further insisted, that, in as much as Mrs. Whatley took out no letters testamentary, and recognized this debt as valid and just, and made payments on it, while continuing in possession of the devised property under the will, she ought to be *estopped* from setting up the statute of limitations as a defense in this case. There are no sufficient elements of estoppel in such a state of facts. No *fact* has been admitted or denied, by word or act, which in conscience precludes an assertion to the contrary.

In this State, as in many others, the Code provides, that "no act, promise, nor acknowledgment," is sufficient to remove the bar to a suit created by the statute of limitations, *except* "a *partial payment* made upon the contract, by the party sought to be charged, before the bar is complete, or an *unconditional promise in writing*, signed by the party to be charged thereby."—Code (1876), § 3240.

Where such is the case, we consider it settled, both by weight of respectable authority and of sound reason, that no mere verbal promise, express or implied, to waive, or not to plead the statute of limitations can be valid. This would be to suspend the statute by another act or promise than that specified by the law-making power, which would be against the policy of the statute itself, and not, for this reason, permissible.—*Shapely v. Abbott*, 42 N. Y. 443, (1 Amer. Rep. 548).

Besides, an *estoppel in pais* must relate to some matter of *fact* which has been previously admitted or denied by the party claimed to be estopped, which he is precluded from averring to the contrary, on the ground that his conduct has deceived or misled to another's injury.—1 Brick. Dig. p. 796, § 10 (cases cited.)

Here, there is no ignorance of fact alleged, no deception practiced, no misstatement made, nor even improper silence averred, which has induced appellant to alter his previous position, to his injury. He was charged with a knowledge

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of the law, and must have known that his claim was barred by lapse of time.

We do not hold that a party may not be *estopped* from pleading the statute of limitations, where there is a concealment, or misrepresentation, of a *fact* of which the party injured was ignorant, and by which conduct he was misled to his prejudice. All statutes are to be construed, as far as possible, to discourage fraud, and to brand with disapprobation all covinous transactions, or unconscionable dealings.

The decree of the Chancellor is affirmed.

## Maybury et al. v. Grady et al.

*Bill by Executors for Construction of Will and to charge Testators' Debts on Real Estate Devised.*

1. *Legacies, general and demonstrative; what are.*—General legacies are those which are payable out of the general assets, and abate in case of a general deficiency; demonstrative legacies are bequests of specified sums of money with the superadded direction to pay out of a particular fund, but if the fund fail, such legacies are payable out of the general assets not specifically bequeathed, or out of funds covered by residuary bequests.

2. *Specific legacies; what are.*—Where testator provided in his will that if a litigated claim should be decided in his favor, "one-half of the net proceeds realized therefrom should go to his wife, and from the other half, if it should amount to \$25,000, the sum of \$10,000 should be paid to Q. to complete the cathedral, and if said half should be less than \$25,000, then out of the remainder, after taking two-fifths for the cathedral, \$2,000 each should be given to J. and S. and B. and M., and Mrs. M.," the remainder going to testator's daughter under other provisions of the will; and if the fund should not be sufficient to pay the special legacies in full, then they should be paid *pro rata*; the legacies given thereby are specific legacies as distinguished from general or demonstrative legacies.

3. *Residuary legatee; who is not.*—Where a testator, after having specifically disposed of his personal property, gave the "rest and residue of all his property" in trust to his executors, except certain contingent legacies, to manage and control for the benefit of his infant daughter until she reached the age of twenty-one years, when he directed them to deliver it over to her, there is an express devise to her of his real estate, and she does not take as a mere residuary legatee.

4. *Marshaling assets to pay debts as between specific legacies and specific devises.*—Where a testator devised his lands in terms which are in substance specific, and bequeathed his personal property in specific legacies, leaving an insufficiency of property not thus devised to pay his debts, and provided in his will: "After payment of all my just debts I give to A. one-half my 'entire personal property,' and the balance to my executors to hold in trust," &c.; providing, also, that one-third of the net income of his real estate should be given to his wife in lieu of dower, this personal property constitutes the primary fund for the payment of such debts, and the remaining debts unpaid

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therefrom constitute a common and equal charge on the whole balance of the estate, excluding the one-third given to the wife in lieu of dower

5. *Charge of debts on personal property; what words create.*—Where a testator provided in his will that “after the payment of all my just debts, &c., I give and bequeath one-half of my entire personal property to my wife A.,” and makes no further disposition of that which might remain after the payment of debts, a special charge is created by these words on the personal property for the payment of the debts.

6. *“My estate”; meaning of these words in the will construed in this case.* Where testator gave one-half of his personal property to his wife, the remaining half of his personal property and all his real property to his executors, to be held by them in trust, to pay to his wife annually one-third of the net income and profits of the realty, if she accepted it in lieu of dower, and to take and hold all the rest of the property of every kind and nature, except the personal property given to his wife, and certain contingent legacies out of a litigated claim, to manage and control for the benefit of his daughter until she reached the age of twenty-one years, when all of said property should be delivered to her except the portion given to his wife and said contingent legacies, including all that remained of the contingent fund arising from said litigated claim; the executors retaining compensation therefrom, and further authorized the executors to appropriate money from “the estate” for the support and education of his daughter, and in a subsequent clause in the will directed that his executors might at their discretion expend money out of “my estate” to pay his funeral expenses, &c.; the words “my estate” refer to that portion of his property given to his daughter, and the executors might, in their discretion, defray the funeral expenses out of the income of the real estate, and the residue of the litigated claim which were given to the daughter.

7. *Sureties of executors on supersedeas bonds; when may recover for payment of judgment made by them.*—The execution of a supersedeas bond on appeal to this court by the executors of an estate, creates no privity between the sureties thereon and the estate; and a payment by the sureties of the judgment on its affirmance gives them no right of action against the estate. They could only recover against the property devised or bequeathed by being subrogated to the rights which the executors could themselves enforce against the estate, and while such executors would, if they had otherwise properly disbursed all the personal estate, be entitled to proceed against specific legacies and devised land to have them marshaled, and themselves reimbursed, yet they must account for all assets realized and for all devastavits, and can only recover as for an original deficiency of assets and not for a deficiency caused by their want of diligence and prudence in the administration.

8. *Administration of estate may be removed into chancery when trusts to be executed.*—Where there are trusts to be executed under the provisions of a will, which are to be continued for a term of years, and the estate is to be kept together, this is sufficient to authorize the removal of the administration into chancery at the instance of the executor.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

This was a bill filed by appellants as executors of the will of D. O. Grady, deceased. The provisions of the will, so far as it is necessary to set them out, are as follows, viz: “3. After the payment of all my just debts and funeral expenses, &c., I give to my wife A. one-half my entire personal property. 4. I give to my wife A., in lieu of her right of dower, one-third of the net rents of my lands for and during her natural life, to be paid annually by my executors. 5. I



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give all the rest and residue of the estate of which I may die seized and possessed, including real and personal property, to my executors in trust, to take possession of and hold all the real estate of which I may die seized and possessed, and hold and rent the same from time to time, and receive the rents, &c., therefor, pay taxes thereon, and keep the property insured at their discretion, and pay to my wife A. one-third of the net rent, &c., arising therefrom in lieu of her right of dower in the same, for her natural life: and to take and hold all the balance of my real estate of every kind, except the part of the personal property given to my wife, which my executors shall pay over to her, and except the contingent legacies hereafter given, and to hold said estate, both real and personal, and manage and control the same until my daughter Carrie shall reach the age of twenty-one years, when all of said property, except that portion given to my wife and said contingent legacies, shall be by my said executors delivered over to my said daughter, my executors retaining reasonable compensation for their trouble as such, &c.; or, if my daughter should die before she attains the age of twenty-one years without leaving any child surviving her, all of said estate shall be delivered to "the Catholic Male and Female Charitable Societies of Mobile," but if she die before attaining the age of twenty-one years leaving a child, or children, then said property to be delivered to said child or children, share and share alike. 6. It is my will and desire that if my cotton claim which is now pending in the Court of Claims at Washington, should be decided in my favor and any sum should be hereafter realized therefrom, that one-half of the net proceeds thereof shall be paid to my beloved wife. Then, from the other half of the net proceeds—provided the said half shall amount to the sum of \$25,000—it is my will and desire that the sum of \$10,000 shall be paid to the Rt. Rev., the Catholic Bishop of Mobile, at the time being—in trust—to be by him expended in completing the Cathedral of Mobile; but should one-half of the net proceeds amount to a less sum than \$25,000, then it is my desire that two-fifths of said half shall be paid to and expended by the said Bishop as aforesaid. And if there should be any recovery of said cotton claim as aforesaid, it is my will and desire that after paying one-half of the net proceeds thereof to my said wife and the special legacy last above mentioned, the sum of \$2,000 shall be paid to each of the following persons, to-wit: To my brothers, John Grady and Simon Grady, to my sister Bridget Eagan, to Margaret Cogan and Mrs. Maxwell, of the residue of the half of said net proceeds; but if said residue shall not

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be sufficient to pay each of said special legacies, then, it is my will and desire that they should be paid *pro rata* out of said residue. 7. My executors shall, from time to time, appropriate money out of the estate at their discretion for the support, education, and maintenance of my daughter Carrie." This clause then appoints the executors, viz: Rt. Rev. John Quinlan, Bishop of Mobile, and his successors in office, J. T. Maybury, Charles Cavaroc and M. J. Brennan, guardians of his daughter. "8. It is my will and desire that all my real estate shall be kept together, and no portion thereof sold or alienated, either by my said executors or by my daughter, Carrie Grady, or by the 'contingent legatees' into whose possession it may come in the event of my daughter's death before she reaches the age of twenty-one years. 9. In case there is any surplus from the net annual revenue from the realty, after disbursing the moneys given in the will, then my said executors shall put by the said surplus as a contingent fund, to be applied by them at any time, if necessary, to the liquidation of any debts which may be incurred by my estate which the current net revenue may be insufficient to extinguish; and in case the one-third of the net amount of the annual rents, issues and profits arising from my estate shall, in the opinion of my said executors, be at any time insufficient for the support and maintenance of my beloved wife, then my said executors are hereby authorized to appropriate from said contingent fund, if any there be, moneys at their discretion for her support. 10. It is my will and desire that my said executors shall have full power and authority to expend money out of my estate at their discretion to pay for my burial expenses, and to build a tomb and monument over my grave, if they think proper."

The bill sets out these provisions of the will, and avers that the personal property of the estate did not equal the debts proven against it by some \$8,000; that the executors had paid the debts of the estate, except one debt of about \$5,000; built the tomb and monument over the grave of the testator, paid the funeral expenses, and for about three years after the death of testator, had supported the widow and the daughter out of the income of the property; that there was a recovery on the cotton claim mentioned in the 6th item of the will; that the executors were advised that the amount thus recovered was a fund specifically bequeathed for the payment of certain legacies mentioned in the will; that the true construction of the will was that this fund did not constitute a part of the general assets of the estate, and that it was their duty to pay the same to the specific lega-

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tees, and that they had accordingly done so; that there remained outstanding a debt of about \$5,000, which they were not in funds to pay; that they derived a large income from the realty for some time after the testator's death, but from circumstances beyond their control, and from shrinkage in the value of the property, the income had decreased so much from year to year, until, at the time of the filing of the bill, it was wholly insufficient to pay the taxes and insurance on the property and keep it in repair; that they were for this reason unable to support the testator's daughter and execute the trusts of the will.

The bill prays that the estate may be removed into the Court of Chancery and there administered; that the will may be construed, and that the court will instruct the complainants as to the execution of the trusts imposed on them by its provisions; that the real estate be charged with the payment of the debts, and a sale thereof be authorized to pay the debts and support the testator's daughter. Testator's widow, his infant daughter, "The Catholic Male and Female Charitable Society of Mobile," and the persons holding the debt against the estate, viz: McGill and McDonnell, were made parties defendant to the bill. From the answer of McGill and McDonnell, it appears that Leach, Forwood and Harrison recovered a judgment against appellants as executors of the estate of D. O. Grady, who then appealed to the Supreme Court and gave a supersedeas bond in the usual form, which was signed by said McGill and McDonnell as sureties. The judgment was affirmed by the Supreme Court, and the sureties paid the amount, being about \$5,200. Carrie Grady, by her guardian *ad litem*, demurred to so much of the bill as sought to charge the real estate left by the testator with the payment of debts, because it appeared by the bill that there was not, and had not been, any deficiency of personal assets, and the testator did not charge his realty with the payment of debts. The Chancellor sustained the demurrer and dismissed the bill, and his decree is assigned as error.

ANDERSON & BOND, and HENRY ST. PAUL, for appellants. The whole property of a decedent is charged with the payment of his debts.—Code, § 2429. Lands may be sold by executors to pay debts, if the personal property is insufficient. Code, § 2447. If the executor, who is the proper party to do so, can not proceed with the matter in the Probate Court, he may invoke the aid of a court of equity, which will examine the trusts of the will, and mould the proceedings so as to save the rights of creditors, and yet disturb as little as pos-



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sible the testator's distribution of his property. The court should charge the unpaid debts on the lands, unless the proceeds of the cotton claim are taken as part of the personal assets, and the whole tenor of the will shows that the specific legacies were not chargeable with the debts. It was regarded as a distinct fund, all of which was intended to be, and was, absorbed in their payment. The general rule for marshaling assets is: 1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. 2. The real estate which is appropriated in the will as a fund for their payment. 3. The descended estate, whether the testator was seized of it when the will was made, or acquired it afterwards. 4. The rents and profits of it, received by the heir after the testator's death—and 5. The lands specifically devised, although they may be generally charged with the payment of debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.—*Adams' Equity*, 263; *Hays v. Jackson*, 5 Mass. 151; *Donne v. Lewis*, 2 Brown's Cas. in Chy. 257; *Davis v. Topp*, 2 Brown's Cas. in Chy. 259

The disposition made by the testator of the cotton money is in specific legacies, to be paid only out of that particular fund, and was a specific disposition of that fund.—*Myers v. Myers*, 33 Ala. 87; *Lightfoot v. Lightfoot*, 27 Ala. 351; *Carter v. Balfour*, 19 Ala. 814; *Pearson v. Darrington*, 18 Ala. 348. A bequest of money to be recovered in a particular suit is a specific bequest.—11 G. & J. 185; *Stout v. Hart*, 7 N. J. L.; *Wallace v. Wallace*, 23 N. H. 149. The devise made in the 5th item of the will is strictly of a residuary character, and, as the land would have descended to the daughter without any reference to the will, the executors only performed the duties of guardians. Land descended is liable to pay debts before assets specifically bequeathed, and it must be first sold before specific legacies can be called in.—*Carter v. Balfour*, *supra*; *Hays v. Jackson*, 5 Mass. 151; 3 P. Wms. 353; *Harvis v. Ingelow*, *Ib.* 96; *Chase v. Lockerman*, 11 G. & J. 185; 3 Paige 402; 2 Dev. Eq. 173; *Adams' Eq.* 263. Even ordinary legacies are chargeable on lands, which pass under a general residuary clause, because the "residue" must mean what remains after satisfying previous express gifts.—*Lewis v. Darling*, 16 How. 1; 2 Binn. 525; 6 *Ib.* 395; 1 Pa. St. 96; 23 N. H. 149.

R. P. DESHON, for appellee. (No brief on file).

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STONE, J.—The argument pressed upon us by appellants rests mainly on the assumption that Grady, by his will, specifically disposed of the fund to be realized on the cotton claim, while the disposition of his lands for his daughter rests on a clause which is, in its nature, residuary. We can not assent to this interpretation. There can be no question that the bequest, contingent on the success of the cotton claim referred to, is specific, so far as it proposes to give of that fund to his wife, to the completion of the cathedral, and the pecuniary legacies to his brothers and sisters. These legacies are made to depend expressly on the successful issue of that claim, and are payable only out of the money thereon to be realized. If that suit was unsuccessful, the legacies failed. There are specific legacies, in contradistinction to general pecuniary legacies, which are payable out of general assets, and are to be abated in case of a general deficiency; and, to demonstrative legacies, which are bequests of specified sums of money, with superadded direction to pay them out of a particular fund. In the latter case, if the designated fund fail, the legacy will be payable out of the general assets not specifically bequeathed, or, out of the fund covered by residuary bequests. In this case, if the fund failed, the legacies were never to take effect.—*Lightfoot v. Lightfoot*, 27 Ala. 351; *Myers v. Myers*, 33 Ala. 85; 2 Lomax on Ex'rs. (33) 69, *et seq.*; 1 Rop. on Leg. 201, *et seq.*: *Ib.* 191; *Wallace v. Wallace*, 23 N. H. 149.

We hold, also, that there is an express devise of the real estate to testator's daughter, and that she does not take as a mere residuary legatee would take.—*Wallace v. Wallace*, *supra*; Lead. Ca. in Eq. Vol. 2, pt. 1, 323 *et seq.*

In addition to the legal intentment, Mr. Grady's will makes the payment of his debts a special charge on his personal property. Its language is: 'After the payment of all my just debts and funeral charges and expenses, I give and bequeath unto my beloved wife, Agnes M. Grady, one-half of my entire personal property,' &c. With the exception of the cotton claim, then of contingent value, the will makes no disposition of the personal property and effects, save of that which should remain after the payment of testator's debts. The will then specially devises and bequeaths to his wife and daughter, his entire real estate, and the residuum of the personalty, except the cotton claim. Testator, then, in specific legacies, gave to his wife, of the fund to be realized on the cotton claim, one-half—and of the residue he made such disposition to his brothers and sisters, and towards the completion of the cathedral, in Mobile, as that the collective be-

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quests from this fund amounted to forty-five thousand dollars. The bill fails to show the amount realized on the cotton claim, but contents itself with the following general averment: "Your orators show unto your honor that said cotton claim was finally decided in favor of said executors, and that your orators as executors complied with the terms and directions of said will as to the disposition of said fund, as specifically and specially directed by the testator, and thereby said fund was exhausted, and none of it now remains in their hands." This averment is objectionably general and indefinite. The bequests out of this fund, as we have shown, are specific, and they are to be paid out of the net proceeds of the cotton claim. If the net proceeds amount to fifty thousand dollars, then one-half, \$25,000, to Mrs. Grady, \$10,000 to the cathedral, and \$10,000 to the brothers and sisters, will aggregate forty-five thousand dollars—and this leaves five thousand dollars for the daughter. If the net sum realized exceeded fifty thousand dollars, then the residue for the daughter would be increased.

In the 9th item of the will is this clause: "And in case the one-third of the net amount of the annual rents, issues and profits arising from my estate shall, in the opinion of my said executors, be at any time insufficient for the support and maintenance of my said beloved wife, then my said executors are hereby authorized to appropriate from said contingent fund, if any there be, moneys at their discretion for her support." Possibly the surplus, if any, of the cotton claim, was expended in this way. The construction placed on the will by the executors and their counsel would have justified such expenditure, and would authorize the averment in the bill, that the money realized on the cotton claim, was disposed of "as specifically and specially directed by the testator." The bill should have set forth, with particularity, the sum realized on the cotton claim, and how it was expended. This, for reasons to be hereafter shown.

Many provisions in the will of Mr. Grady furnish unmistakable evidence that he considered his personal estate, independent of the cotton claim, amply sufficient to pay his debts, and leave a surplus. He bequeathed one-half of his personal property, after the payment of his debts, to his wife, and the other half to his daughter. He gave to his executors power and authority to expend money out of his estate at their discretion, to pay his burial expenses, and to build a tomb and monument over his grave. The question will doubtless arise, and should be decided, what did the testator mean by the words, "my estate," in the 10th item of



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his will. It is from this source he directs his executors, at their discretion, to pay for his burial, and for a tomb and monument. In the fifth item, testator bequeathes and devises to his executors the remaining half of his personal estate, and all his real estate, in trust, first, to pay to his wife annually one-third of the net rents of the realty, "provided she receive the same in lieu of her dower in and to said lands and premises." He then adds: "and to take and hold all the balance of my estate of any and every kind or nature whatsoever," except the half of his personal property given to his wife, and except the contingent legacies out of the cotton claim, "to hold said estate both real and personal, and manage and control the same, until my beloved daughter, Carrie Grady, shall reach the age of twenty-one years, when all said property as aforesaid, except that portion devised to my beloved wife, and the contingent legacies hereinafter named, together with all that shall remain of the contingent fund hereinafter named, shall be, by my said executors, delivered over to my said daughter, Carrie Grady—my said executors retaining, from year to year, reasonable and proper sums of money, as compensation for their trouble and expense as such executors." In the 7th item is this language: "It is my will and desire that my said executors shall, from time to time, appropriate moneys out of the estate, at their discretion, for the support, maintenance and education of my said daughter, Carrie M. Grady." In the 8th item, testator speaks of all the lands as "my real estate." We think testator, by the terms "my estate," in the 10th item, intended to embrace the property, real and personal, given to his daughter, Carrie, for the following reasons: First, he had directed that part of his estate to be kept together, until Carrie reached the age of twenty-one, while, as to the residue of his estate, he gave no such direction. True, as to one-third of the rents and income of the lands so ordered to be kept together, the remark above does not apply, during the life of Mrs. Grady; but this was given to her in lieu of dower, over which he could exercise no power of disposition, testamentary or otherwise. He had no power to fasten a charge on this interest, without the wife's consent, express or implied. In the second place, testator, by devise and specific bequest, had disposed of his entire property, real and personal, in such form as that all would soon pass from his executors, save that to be kept together for his daughter. Third, testator, as shown above, speaks of the provision made for his daughter, as "the estate," excluding therefrom the other legacies contained in the will. We hold, therefore,

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that a discretion was given to the executors, to defray the expense of the burial, and to erect a suitable tomb and monument, out of the income of the real estate and the residue of the cotton money, which were given to the daughter.

We have shown that the devise of the real estate, and what we called the contingent legacies, are all in their nature specific. These comprise all of the estate, save what is in the 3d item of the will, called the "entire personal property." The bill avers there is now no personal property, and that at testator's death, the debts of the estate exceeded the value of said entire personal property, by some eight thousand dollars. One object of the bill is to fasten a charge on the lands devised to the daughter, for the alleged deficiency. The daughter is still an infant of immature years, and it is contended for her that the money bequests, product of the cotton claim, must be first exhausted, before lands devised can be made subject.

In this, as in most of the States composing the Union, lands as well as personal property are charged with the payment of decedent's debts. Such is the law of England now; but here, as well as there, in the absence of testamentary direction, personal property is the fund primarily chargeable with the payment of debts. In the multiform conditions in which estates are left, sometimes by the caprice, but more frequently by the oversight, if not ignorance of testators, the question of priority of liability between claimants under wills, in different right, has been many times before the courts. Some of the rules declared are so remarkable, and so clearly right, that we find no contrariety of opinion upon them. Upon others, courts of the highest character, and the same court at different times have differed. In *Livingston v. Newkirk*, 3 Johns Ch. 312, the question of primary liability arose between lands descended and lands devised. The opinion of the chancellor went no farther than the wants of the case. He consequently stated the order of marshaling to that extent only. He said: "The order of marshaling assets towards payment of debts, is to apply—1. The personal estate; 2. Lands descended; 3. Lands devised." In *Donne v. Lewis*, 2 Bro. C. C. 257, Lord Thurlow stated his idea of the order in which assets were to be applied to be—1. The general personal estate; 2. Ordinarily speaking, estates devised for the payment of debts; 3. Estates descended; 4. Estates specifically devised, even though charged generally with the payment of debts. In 2 Lomax on Ex'rs. (255) 426, the rule is stated as follows: 1. Personal estate not specifically bequeathed, or exempted expressly, or by plain implication,

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from the payment of debts ; 2. Lands expressly devised for, (not merely charged with), the payment of debts ; 3. Descended estates ; 4. Lands charged with the payment of debts. In Story Eq. Ju. § 577, the rule is stated substantially in the language of Lord Thurlow, and is confined to four classes. So Chancellor Kent adopts the same classification in his Commentaries, Vol. 4, marg. p. 421. In *Hays v. Jackson*, 6 Mass. 147, decided in 1809, Parsons, C. J., stated the rule in equity, for marshaling assets, to be settled as follows : "1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts ; 2. The real estate which is appropriated in the will as a fund for the payment ; 3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired ; 4. The rents and profits of it, received by the heir after the testator's death ; 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose." It will be observed that, although all the several statements above are in the main harmonious, neither of them covers the whole possible ground. Suppose the case of a devise of real estate, and a bequest of personal property, each expressly subject to the payment of debts, without direction or intimation as to which species of property shall be first made liable, and the debts exhaust only a part of such devised and bequeathed property. Shall the personal property be first taken, or shall the burden fall alike, and *pro rata*, upon each species of property ? Or, suppose the more common case, which we have shown is the case in hand, where the testator devises his lands, in terms which are in substance specific, and bequeathes his personal property in specific legacies, leaving an insufficiency of property, not thus devised and bequeathed, for the payment of his debts, are there any priorities of liability as between the real and personal property thus disposed of by the will ? These are possible categories, which are not provided for in any of the rules stated above. We confine what we have to say to the last of the supposed cases. We cannot arrive at the intention of the testator, for evidently he intended, alike and equally, that the devise and bequests should have full effect. As said by Justice Gibson in *Shaw v. McCameron*, 11 Serg. & R. 252, "It is probable the matter never was the subject of his thoughts, and we are compelled to look for an *intention* where none in fact exists." Manifestly Mr. Grady had the conviction that what he, in the third item of his will, designates as his "entire personal property," would pay his



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debts and funeral expenses, and leave a surplus, which he bequeathed in equal parts to his wife and daughter. If he had not been so convinced, the care and skill with which his will is prepared, give assurance that he would have made other provision to meet the deficiency. The law, common and statute, makes the personal property the primary fund for the payment of debts, unless such personal property is disposed of in specific legacies, or the will expressly charges the debts on the realty in the first instance. Hence, when the will does not specifically bequeath the personalty, and does not charge the realty in exoneration of the personalty, the presumption arises that the testator intended the personalty should be first applied to the payment of his debts. All men are conclusively presumed to know the law, and testators are no exception to the rule. When, however, as is claimed in this case, the debts exceed the value of testator's entire property not disposed of by specific devises and bequests, no such presumption can arise. As said by Gibson, J., "the matter never was the subject of his thoughts." In this case, it never entered into testator's mind that his personal property mentioned in the third item, was not amply sufficient to pay his debts and funeral expenses, and, of consequence, he had no intention whatever as to the fund or source from which to provide for the balance of his debts. We can not suppose he intended to provide against an event, which, if he thought on the subject, appeared to him impossible. Prudent men may provide for events, within the range of possibility. It would be unsafe to travel beyond this, in search of an imaginary intention.

In 2 Jarman on Wills, Perkins' ed. (546-7), 391-2, the rule of marshaling assets for the payment of debts is thus stated: "1st. The general personal estate, not expressly or by implication exempted. 2nd. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited. 3rd. Estates which descend to the heir, whether acquired before, or after the making of the will. 4th. Devised or bequeathed property, real or personal, which is charged with debts and those specifically disposed of, subject to such charge. 5th. General pecuniary legacies *pro rata*. 6th. Specific legacies *pro rata*. 7th. Real estate devised." It will be seen that in the 4th class, no discrimination is made between devised real property, and bequeathed personal property, while in the 6th and 7th classes, specific legacies are first made liable, before lands devised can be subjected. What are included in Mr. Jarman's 6th, and 7th classes, are alone involved in this suit; for we are dealing alone with devised

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lands and specific legacies. There are many highly respectable authorities which uphold Mr. Jarman's distinction. Perhaps a majority of the older American cases point that way. The rule is so stated in *Hoover v. Hoover*, 5 Barr. 351, although it was *dictum*, so far as it affects this case. So, what Lee, J., said on this point in *Elliott v. Carter*, 9 Grat. 541, is *dictum*. The following authorities favor this view: *Rogers v. Rogers*, 1 Paige, 188; *Shreve v. Shreve*, 2 Stockt. Ch. 385; *Worley v. Worley*, 1 Bailey Eq. 397; *Cornwall v. Cornwall*, 12 Simons, 298.

Adams, in his work on Equity, (263) 590, groups the scale of liability for debts into six classes, his 6th being: "Personal and real estate specifically given, and not charged with debts." On page (265) 597, this author says: "In regard to assets of the fourth and sixth classes, where both personal and real estate are included, a question has arisen, whether the personal and real estate should contribute *pro rata*, or whether the personalty is first liable. It has been determined that in both cases there is a liability *pro rata*, and that accordingly if land be devised, and a testator die indebted by bond, a specific legatee may compel the devisee to contribute." This doctrine meets the approbation of Mr. Roper in his work on Legacies, vol. 1, p. 358, *et seq.* *Long v. Short*, 1 P. Wms. 403, is the leading authority on this question. It was decided by Cowper, Lord Chancellor, in 1717. The question was between a devisee of lands held in fee, the donee of a leasehold estate, held for a term of years, and the legatee of an annuity to be paid out of the leasehold estate. There was a deficiency of assets to pay the specialty debts, and the bill was filed by the executor, who was the heir, to marshal the assets, and to have it determined whether the said debts should be charged on the real or leasehold estate. The Lord Chancellor decreed: 1st. That a devise of a rent charge out of a term, is as much a specific devise, as if it had been of the term itself. 2nd. That the devise of a term for years is as much a specific devise, as a devise of lands in fee. Wherefore, each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intent, to defeat either, by subjecting it to the testator's debts. \* \* So that, to prevent the disappointment of the testator's intent, the court thought it reasonable that the devisee of the fee simple estate, and the devisees of the lease and annuity, should each contribute to the debts by specialty, in proportion to the value of the respective premises.

*Tombs v. Roch*, 2 Coll. 490, came before that able equity lawyer, Sir Knight Bruce, Vice-Chancellor. In an argument

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that is certainly able, we may say exhaustive, he ruled that in case of specific legatees and devisees, where there is a deficiency of other assets to pay debts, the two classes must contribute ratably. That opinion, in its clearness and force, is a model of judicial writing, and may be consulted with profit by any inquirer after truth. One expression we can not forbear to copy. He said: "I consider it to be perfectly correct in principle to say, that every will ought to be read as in effect embodying a declaration by the testator, that the payment of his debts shall be as far as possible so arranged, as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention." In *Silk v. Prime*, 2 Coll. 509, after disposing of all assets on which a prior liability rested for the payment of debts, the court declared, in case the same shall prove insufficient, "such deficiency is to be made good out of the said testator's personal estate specifically bequeathed, and the real estate at Outnewton, devised by his will to Sarah Thompson, his mother, in fee; and the said estates are to contribute in proportion to such deficiency."

*Young v. Hassard*, 1 Jones & LaTouche, 466, came before Sir Edward Sugden when he was Lord Chancellor. It was urged before him that *Cornwall v. Cornwall*, *supra*, had overruled *Long v. Short*. He said: "I confess I was surprised by the statement that *Long v. Short* had been overruled. I have always considered it as a binding authority; have advised on the strength of it; cited it, and seen it acted upon; and I think it to be regretted, that that which has for so many years been considered as a settled rule of law, should be now disturbed. I have a very great respect for the learned judge [Sir Lancelot Shadwell, V-C.] by whom the case of *Cornwall v. Cornwall* was decided; but I can not say that I have any doubt that *Long v. Short* is still a binding authority. The decision in that case depended on this, that, at law, all the funds were liable to the debt; and the question was, what was the intention of the testator? The devise of the lands and of the chattels real, and of the annuity, being specific, Lord Cowper referred to the statute of fraudulent devises, and said that that statute made real estate in the hands of the devisee, liable to the payment of the specialty debt; and, therefore, finding that all the funds were liable—for this court does not pretend to make a fund liable to the payment of a demand, to which it was not liable before; it never creates a liability, but only, by marshaling funds, prevents a creditor from disappointing the intention of the testator—and finding that it was the clear intention of the testator to give



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the chattel interest to the legatee, just as he had given the real estate to the devisee, he was of opinion that they ought to hear the burden ratably; and that, in that manner, the intention of the testator would be effectuated. \* \* I see nothing to impeach the decision in *Long v. Short*; and if I were now called on to decide the question, I should feel myself bound to support the authority of that case."

In Armstrong's appeal, Sharswood, J., said: "It was settled in England by *Long v. Short*, that specific devises of land and specific bequests of personalty, must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts; and it was equally the intention of the testator, that the legatee should have the chattel, and the devisee the land. In this State, where lands have always been assets for the payment of debts by simple contract, as well as by specialty, the rule is general—that whenever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably."—63 Penn. St. 312; *Hollowell's Estate*, 23 Penn. St. 223; *Heusman v. Fryer*, 3 Ch. App. Cas. L. R. 420; *Brunt's Will*, 40 Mo. 266; *Chase v. Lookerman*, 11 Gill & Johns. 185; *Gervis v. Gervis*, 14 Sim. 654. In Leading Ca. in Eq., vol. 2, part 1, (notes to *Aldrich v. Cooper*, 8 Ves. 308), beginning at page 323 of 4th Amer. ed., is a full discussion of this question.

There are cases in which testators blend or mix realty and personalty in the creation of a source or fund for the payment of debts and legacies, which are governed by their own peculiar circumstances. They shed no direct light on the question we are discussing.—*Broughton v. James*, 1 Coll. 26; *Atty-Gen'l v. Southgate*, 12 Sim. 77; *Roberts v. Walker*, 1 Russ. & Myl. 752; *Hassanclever v. Tucker*, 2 Bin. 525; *Whitman v. Norton*, 6 Bin. 395; *Lewis v. Darling*, 16 How. U. S. 1. There is nothing in *Carter v. Balfour*, 19 Ala. 814, opposed to the views expressed above.

We hold that after exhausting what testator, in the 3rd item, calls "my entire personal property," if there remained any portion of the debts of the estate unprovided for, such excess of debts is a common and equal charge upon the whole balance of the estate, real and personal, less the third of the land rents, given in lieu of dower, to Mrs. Grady during her lifetime.

We have shown heretofore what testator intended by the terms "my estate," in the 10th item of his will. We think he meant to confer on his executors a discretion in the use of what he had given to his daughter, or rather its income, for

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the purpose therein expressed, should the personal property prove insufficient for the purpose, after paying the debts. If this discretionary power was exercised, and any portion of the income of the lands devised to the daughter was so used, then such sum must be excluded from the computation, in marshaling. It gives to the daughter no right to contribution from the legatees. If, however, any portion of the income and rents derived from the lands devised to her, or, of the surplus of the cotton claim, which the will gives to her specifically—to-wit: one-tenth of any possible recovery—has been employed and consumed in the payment of testator's debts, to the extent of such use she is entitled to contribution from all the legatees *pro rata*.

The bill in the present case is filed by the executors, and seeks to charge the unpaid balance of the debts on the lands devised to the daughter. The averments are not definite enough to show the character of the debts, and the exact amount of the original deficiency. There is, also, a strong implication in the averments of the bill that part of the income of the real estate devised, and, perhaps, the daughter's share of the cotton money, have been used in the payment of debts, or, perhaps, in expenses of administration; and, in this way, the alleged original deficiency of eight thousand dollars has been reduced to about five thousand dollars. The bill should correctly set forth how this matter stands; for in taking the account, with a view to marshaling, the daughter will be entitled to a credit, for the sum of her rents and cotton money so used. It is no answer to this view, that the executors have paid the pecuniary legacies. They should have retained enough to meet all debts, certain and contingent; and in the assertion of any claim to fasten the charge of the unpaid debts on the lands, they stand in no more favorable light than if the entire proceeds of the cotton claim remained in their hands. They paid it in their own wrong, and must abide the consequences, if they have no recourse over against the legatees. Our purpose in what we have said, is to declare that if any part of the income of the daughter's devised estate, or, of her share of the cotton money, has been expended in paying debts, or expenses of administration, such sums must be brought into the account in any process of marshaling, and she allowed a credit therefor.

The present bill, as we have seen, is by the executors; and one of its purposes was to raise a fund with which to repay the sureties on a supersedeas bond, the moneys they had been required to pay on the affirmed judgment of Leach, Harrison

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& Farwood, against the executors of Grady, 58 Ala. 339. Those sureties were the sureties, not of the estate of Grady, but of his executors. When they paid the money, they paid it for the executors, and not for the estate, between which and themselves, the execution of the bond created no privity. By the payment, a cause of action at law accrued to them, against the executors, to recover the money thus paid for them; but they acquired no right of action against the estate. If the executors themselves had paid the money, they would have been entitled to a credit therefor in their executorial accounts. If they had otherwise disbursed, according to law, all personal assets with which they were chargeable, the primary fund for the payment of debts, this would give them, the executors, the right to proceed against the specific legacies and devised lands, to have them marshaled, and themselves reimbursed. But, in such proceeding, they must account for all assets realized, and for all devastavits, and can only recover for the balance, as for an original deficiency of assets. A deficiency caused by their errors in distribution, or, by a want of diligence and prudence in administration, gives them no recourse against remaining assets.—*Pearson v. Darrington*, 11th head-note, 32 Ala. 227-249. So, there may be cases where sureties, who have paid money for executors, as charged in this case, would have recourse on the devised and bequeathed property for their reimbursement; but, in such case, the proceeding would be governed by the same rules, as would obtain in a similar suit by executors themselves. They could only claim to be subrogated to the rights which their principals, the executors, could enforce against the estate.—*Van Derveer v. Ware*, at present term.

According to the principles declared above, the bill in the present case is defective. This would secure an affirmance of the decree of the Chancellor, but for a question presently to be noticed, there being no motion or offer in the court below to amend the bill. The bill, however, prays a removal of the administration into the Chancery Court, and we think that prayer should have been granted. There are trusts to be executed which are of a very delicate nature, and the estate, being required to be kept together, and the trusts continued for a series of years, we hold that a sufficient excuse is shown by the executors, why the removal should be made at their instance.

Reversed and remanded.

Let the costs of appeal be divided equally between appellants and appellees.



[*Mobile & Montgomery Railway Co. v. Yeates.*]

## Mobile & Montgomery Railway Co. v. Yeates.

*Action on Judgment recovered in suit against the Mobile & Montgomery Railroad Company.*

1. *Corporation admits identity of name by appearing and pleading.*—In an action against a corporation sued by the name of the Montgomery and Mobile Railroad Company, an appearance by attorney and pleadings filed in the name of the Montgomery and Mobile Railway Company are a conclusive admission, in a subsequent action on the judgment, of the identity of the two corporations.

2. *Parol evidence; may be received in aid of judgment.*—The record of such a judgment, unaided by parol evidence, might be conclusive as to the identity of the corporations; but there is no error in receiving parol evidence in aid of it.

3. *Attorney and client; what communications between are privileged.*—Professional communications between attorney and client are regarded as confidential, and are protected on grounds of public policy; but the rule does not extend to communications openly made in the presence of third persons, nor can the attorney refuse to disclose by whom he was employed in a judicial proceeding.

4. *Argument before jury, regulated by the court.*—If the defendant's counsel declines to address the jury, the court may nevertheless, in its discretion, permit a concluding argument by the plaintiff's counsel.

APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

This was an action brought by J. K. Yeates against the Mobile and Montgomery Railway Company. The complaint avers, that a judgment was recovered against the appellant, under the name of the Mobile and Montgomery Railroad Company. The defendant pleaded—1st, *nil tiel* record; and, 2d, want of service on the railway company, averring it to be a different corporation from the railroad company. On the trial, the record of the judgment on which suit was brought was in evidence, and it appeared that the suit had been brought against the M. & M. Railroad Company; that the M. & M. Railway Company had appeared, by attorney, and filed pleas in the case, as defendant therein. R. Inge Smith, Esq., being called as a witness by the plaintiff, stated that all he knew about the case was derived from his client, while the relation of client and attorney existed, and he claimed it as a privileged communication. The defendant objected to Mr. Smith's testifying to any fact obtained from his client in the course of his employment. The court overruled the objec-

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tion, and the defendant excepted. The witness then testified, that he appeared in court to assist in defending this case, but that he did not recollect the facts in this particular case; that he and Mr. Gregory L. Smith were partners, and were the retained attorneys of the railway company; that it was customary for the defendant to send them papers in cases, and statements of facts and lists of witnesses; that he saw such a statement in the office in the Yeates case, soon after it was brought, but he did not know how it came there; that they looked to the railway company for their pay in the case, and the bill was made out against the railway company; that he thought the bill had been paid, and he had no doubt but that he defended for the railway company. On cross-examination, the witness stated that all the pleadings in the cause were filed by his partner, G. L. Smith; that his firm were the attorneys for the *railway* company and for the *railroad* company. Defendant asked the witness if his firm did not defend suits against the railroad company on instructions from the *railway* company, and look to the railway company for their pay. Plaintiff objected to the question; the court sustained the objection, and defendant excepted. Defendant then asked the witness if his firm did not defend the suit of *Meaher v. The Railroad Company*, and receive pay for their services from the railway company. Plaintiff objected to the question, and the court sustaining the objection, the defendant excepted. The other facts in the case appear in the opinion of the Court.

One of the attorneys for the plaintiff opened the case with an argument to the jury. Then one of the attorneys for the defendant said he had a charge to ask, which was in these words: "I charge you that under the evidence you must find for the defendant;" and said he had no argument to make to the jury, but did make an argument to the court in the presence of the jury, in which he commented on the evidence. The other attorney for the defendant then addressed the court in the presence of the jury, and reviewed the evidence. The other attorney for the plaintiff, after having addressed the court in reply to the arguments for the defendant, turned to address the jury, when the defendant objected to his doing so. The court overruled the objection, and permitted the argument to be made, and defendant excepted.

Defendant requested the court to charge the jury—1. That under the evidence they must find for the defendant. 2. Unless the evidence shows that the railway company existed, at the time the liability accrued, and the judgment was rendered, you must find for the defendant. And this you must find

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from the testimony. Although you know that the railway company did exist at this time, unless you derive the knowledge from the evidence in the case, you must find for the defendant. 3. The plaintiff can not recover of the defendant in this case, unless the jury are satisfied from the evidence that the *Mobile & Montgomery Railway Company* and the *Mobile & Montgomery Railroad Company* were one and the same corporation at the time of the trial of the original suit on which this is predicated. 4. The plaintiff can not now contradict the record, that he originally sued the *Mobile & Montgomery Railroad Company*, nor set up that he did not intend to do what the record shows that he did do.

The court refused to give these charges, and the defendant excepted separately and severally to each refusal. There was a verdict for the plaintiff. The refusal to give the charges asked, and the rulings of the court on the evidence, and in allowing plaintiff's counsel to address the jury, were assigned as error.

G. L. SMITH, for appellant.

SHELDON & MCKINSTRY, for appellee.

SOMERVILLE, J.—In January, 1877, suit was instituted by the appellee against the *Mobile & Montgomery Railroad Company*. Process was served on George Nason, as general agent for the said defendant company.

Upon the trial of the cause an appearance was entered, and a defense of the action was made by the appellant, who pleaded under the corporate name and style of the *Mobile & Montgomery Railway Company*. Demurrers were interposed and appear upon the record in the name of the appellant, and both demurrers and pleas style the said *railway* company to be “the *defendant*” in the suit. The evidence shows that the attorneys, who defended the suit, were employed and paid by the *M. & M. Railway Company*, and the said George Nason is shown to have held the same office under both companies, and process was served on him as agent in the present suit, as well as in the one against the *M. & M. Railroad Company*. There is no evidence which tends to prove that this appearance and defense were made without unmistakable authority on the part of the counsel. On April 12, 1878, judgment final was rendered against said *Mobile & Montgomery Railroad Company*, upon which execution issued with a return of “no property found.” On February 12, 1879, this suit against appellant was brought on the said judgment, which is averred in legal effect to be a judgment against the



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appellant railway company, and binding as such on it. The conclusiveness of this judgment is the main question raised by the rulings of the court below on the evidence, and the various charges asked and refused.

We think the facts of this case work an *estoppel* on the appellant. The *pleadings*, which substantially aver the appellant to be the real and true *defendant*, who was erroneously sued under another name, constitute a solemn or judicial admission of the identity of the two corporate companies, the Mobile & Montgomery Railroad Co., and the Mobile & Montgomery Railway Co. Such admissions *in judicio*, made solemnly and deliberately in the course of the regular proceedings in a court of justice, are the highest substitutes for so many proofs of fact, and are binding conclusively on parties and privies. *Res judicata inter partes jus facit*. The question is not whether there is an actual identity of parties, but simply whether there is a conclusive *admission* of such identity, which precludes a subsequent denial of it, or repudiation of its truth.—1 Greenl. Ev. §§ 27, 205, 22.

The admission has, furthermore, been acted on by the plaintiff in the judgment, who might otherwise have amended his pleadings or dismissed and recommenced his action as circumstances required, and the law permitted. Good faith and a sound public policy now forbid that he shall be prejudiced by any attempt to gainsay or deny what has been thus solemnly admitted.

The record, unaided by extrinsic proof, might be conclusive, but there was no error in sustaining the record by parol evidence. This is not a contradiction, but a verification of the record. Even where the proceedings fail to set out or show the true name of a litigant, the better doctrine seems to be that parol evidence is admissible to establish the fact, that the parties in two separate suits are really, though not nominally, the same. Such seems to be the doctrine very clearly enunciated by this court in *Tarleton v. Johnson*, 25 Ala. 300. So it has been held that the record of a judgment against *James R.* is admissible in an action against *Joseph R.*, if it is made to appear that the latter was the same person, and was a party to the suit, and actually defended it.—*Stevellie v. Read*, 2 Wash. Cir. Ct. Rep. 274.

The law very properly protects certain professional communications between attorney and client as confidential, on grounds of public policy. This does not apply to matters openly communicated or disclosed in the presence of third parties, and it has often been decided that an attorney may be required to disclose by whom he is employed in a judicial

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proceeding. There was no violation of professional confidence in the statement made by the attorney for the appellant, and the court correctly overruled the objection to it. *Martin v. Anderson*, 21 Geo. 301; *Broun v. Payson*, 6 N. H. 443; 2 Best on Ev. § 581, note (1).

It was a matter of discretion with the lower court to permit the plaintiff's counsel to close the argument after the refusal of the defendant's counsel to address the jury, and such action is not revisable on error.

The charges requested by appellant's counsel are plainly incompatible with the above views, and were properly refused.

The other rulings of the court on the admission of evidence were error without injury, if error at all. The result of the suit, as affirmatively shown by the record, could not possibly be affected by them, and they are therefore no grounds for reversal.—*Lyles v. Clements*, 49 Ala. 445; *Grubbs v. Railroad*, 50 Ala. 398.

The judgment of the City Court is affirmed.

## Moses et al v. St. Paul et al.

### *Bill in Equity to Compel Transfer of Stock, and for an Account.*

1. *Creditor by simple contract; when may come into equity to enforce collection of his debt.*—A simple contract creditor cannot obtain the assistance of a court of equity to compel the payment of his debt, unless he has a lien which it is the province of that court to enforce, or his case is one of the particular class for which provision is made by the statute.

2. *Same; where the demand is legal, an equity must be shown.*—When the demand is purely legal, the creditor must show, in addition thereto, some clear, controlling equity, which he is entitled to enforce.

3. *Statute of limitation in suits by assignees in bankruptcy; what are embraced in.*—The provision of the bankrupt law declaring that no suit, either at law or in equity, "shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property, transferable to, or vested in, such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee" (Rev. Stat. U. S. § 5057), applies not only to suits in which the assignee is the real and beneficial actor, but also to suits upon causes of action derived from him after the statutory bar is complete; and it extends to every cause of action existing when the assignment is executed to the assignee, and the right and title to sue in respect to which is derived from the assignment, and is independent of the State statute of limitations.

4. *When fraudulent concealment of facts will take case out of statute.*—Fraudulent concealment of facts by the bankrupt, until after the completion of the statutory bar, will take the case out of the operation of the statute of limitations, as against him or persons colluding with him, but not as against innocent persons claiming adversely to him,

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APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The Tuscaloosa Scientific and Art Association, a corporation under the laws of Alabama, became indebted to Walsh, Smith & Co., for \$53,992.30. To secure the payment of this sum, the association hypothecated 274 shares of its capital stock with Walsh, Smith & Co., by actual delivery, and agreed that 50 per cent. of the net earnings should be devoted to payment of its debt. On June 12th, 1874, Walsh, Smith & Co. were adjudicated bankrupts, and Barnwall and Gaynor were appointed assignees of the bankrupt estate. The assignees, on June 3, 1875, applied for leave to sell the debts, judgments, &c., due said firm, and an order to that effect was afterwards granted by Hon. J. Bruce, District Judge. Walsh, Smith & Co., failed to place on their schedules, as bankrupts, and among their assets, the shares of stock in the Tuscaloosa Scientific and Art Association. On the 22d of May, 1876, Gaynor, who was one of the assignees, learned that said association was indebted to Walsh, Smith & Co., and that said stock had been hypothecated with them. On the 20th of May, 1878, Gaynor, the assignee (Barnwall having resigned), sold, transferred and assigned said stock and debt to I. C. Moses, (appellant's intestate). Moses took possession of 262 shares of said stock, and requested the secretary, Henry St. Paul, to transfer the same on the books of the corporation in his name, but this was refused. Thereupon, said Moses filed this bill setting out the foregoing facts, and averring that the act of the bankrupts in omitting the debt due them from said association, and the certificates of stock hypothecated to secure the same, from their schedules, was a fraud on their creditors and on the bankrupt law; that said debt, and the ownership of the stock, was concealed by said bankrupts to prevent their creditors from having the same sold. The bill prayed that St. Paul, as secretary of said association, be compelled to transfer the said shares of stock to said I. C. Moses; that an account be taken of the net earnings of the association, and that his *pro rata* share thereof be decreed to be paid to him. A demurrer was interposed by the defendants, on the ground—1st. That more than two years had elapsed since the cause of action sought to be enforced by the bill accrued to the assignees, and the facts in relation thereto were known to the assignee more than two years before the filing of the bill. 2d. Because the corporation was not made a party defendant. The Chancellor sustained the demurrer, and dismissed the bill, and his decree is here assigned for error, the appeal therefrom being



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prosecuted in the name of A. J. Moses, as administrator of I. C. Moses' estate.

BOYLES, FAITH & CLOUD, for appellant.—The facts stated in the bill which are material and well pleaded, are taken as true on demurrer.—Mitf. and Tyler Eq. Pl. 306. And it appears therefrom that the sale of the stock was made within less than two years from the date of the discovery of the fraud. In *Bailey, Assignee, v. Glover*, 21 Wall. 342, it is said: "Where the action is intended to obtain redress against fraud concealed by the party, or which, by its nature, remains secret, the bar does not begin to run until the fraud is discovered." And again, "when fraud has been concealed, or is of such a nature as to conceal itself, the statute does not begin to run until the fraud is discovered." The validity of a sale of property by an assignee in bankruptcy cannot be questioned in a collateral proceeding in a State court. *Steele v. Moody*, 16 Nat. Bk. R. 2. Where a pledge remains in possession of a pledgee, the statute of limitations does not begin to run against the pledgor until tender of the debt for which the pledge was given, and a refusal of the pledgee to restore the pledge upon demand of the pledgor.—6 Ohio St. 131. The statute did not begin to run until after the demand of the certificates and a tender of the money.—4 E. D. Smith, 490; 2 Abb. Pr. 301; 12 Johns Ch. 146; 16 Eng. Com. Law, 264; 6 D. & R. 384. Delivery of stock as collateral to secure a pre-existing debt, is a pledge and not a mortgage. 4 Sand. (N. Y.) 74. The creditor cannot hold the pledge by prescription, as no length of time will prevent the debtor or his representative from redeeming.—2 Gaines' Cases, 213; 50 N. H. 37. The pledgee has a right to the possession, although the pledgor becomes bankrupt.—5 Otto, 764. Nor does it deprive the pledgee of the right to dispose of the pledge upon default.—4 Otto, 734.

ST. PAUL & LABUZAN, and HERNDON & SMITH, for appellees. (No briefs have come into the hands of the Reporter.)

BRICKELL, C. J.—A simple-contract creditor, without a lien it is the province of a court of equity to enforce, except in the particular cases for which the statutes provide, (within which the present case does not fall), cannot obtain the assistance of that court to compel the payment of his debt. The jurisdiction and remedies of courts of law are adequate, and there is no room for equitable intervention. The debt due from the Tuscaloosa Art and Scientific Asso-

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ciation, or of the particular stockholders who may or not have made themselves answerable for it, to Walsh, Smith & Co., of which the appellant claims to be the assignee, is a pure legal demand, capable of enforcement by clear and adequate legal remedies; and, of consequence, to support the present bill, there must be shown, in addition to the legal demand, some clear, controlling equity the appellant is entitled to enforce.

The equity is grounded upon the ownership of the shares of the stock of the association, which had been pledged to Walsh, Smith & Co., as security for the debt; a transfer of which to himself, on the books of the association, the intestate of the appellant had demanded, and which had been refused; and an account of the corporate business, and the payment to him of whatever dividends or profits had accrued thereon. If the equity exists, it was derived from the sale and assignment to the intestate of the appellant, made by the assignee in bankruptcy of Walsh, Smith & Co., more than two years after his appointment, and the execution to him of an assignment of all the property and effects of the bankrupts. Whatever may be the nature and character of the claim, and of the right now asserted, it had accrued, and was in all respects as fully a cause of action in the bankrupts, and in the assignee at the time of his appointment, as it was when the sale and assignment was made to the intestate, or when this bill was filed. The bankrupt law had this provision: "No suit either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property transferable to, or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."—U. S. Rev. Stat. § 5057. The question of the demurrer is, whether the case made by the bill falls within the operation of this statute; and if it does, are not the averments of fraud and concealment sufficient to avoid its bar.

The statute applies not only to suits in which the assignee is the real and beneficial actor, but also to suits upon causes of action derived from him, after the statutory bar is complete.—*Pike v. Lowell*, 32 Me. 245. He may not transfer any greater or other cause of action, than that which resides in him. And it is as applicable, by its very words, to suits in equity, as to suits in courts of law. It is said of it by the Supreme Court of the United States: "This is a statute of

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limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons, touching the property or rights of the bankrupt, transferable to, or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee."—*Bailey v. Glover*, 21 Wall, 346. The statute applies to every cause of action existing when the assignment is executed to the assignee, and right and title to sue in respect to which is derived from it. The cause of action not being barred at the time of the assignment, it can not, under the operation of the statute, be barred in a shorter period than two years, though, applying the statute of limitations of the State, a less period would perfect a bar. Nor can the period of limitation be extended more than two years, though a longer period must have elapsed under the statute of the State to operate a bar. It has no connection with State statutes of limitation, but is a separate, independent statute, enacted in the execution of the power conferred on the Congress "to establish a uniform system of bankruptcy," involving, of necessity, the power to prescribe its own limitation of actions touching the estates, rights, and credits, which are to be administered in its own tribunals, and through its own agencies.—*Peeper v. Canner*, 5 Bank. Reg. 252; *Freeland v. Holloman*, 9 Ib. 331.

It is argued that the scope and purpose of the bill is merely the enforcement of the pledge of the stock for the payment of the debt, and that to such a suit the statutes of limitation have never been applied, the right of enforcing the pledge continuing until the debt is paid, or until the lapse of time creates a presumption of payment. Statutes of limitation do not, generally, extinguish debts, though barring remedies to enforce them. Legal remedies may, however, be barred, without affecting the right in equity to enforce liens or charges, whether created by contract, or arising by operation of law.—Ang. Lim. § 73. And as to the rights of a pawnor or pawnee, prescription, or statutes of limitation, do not run.—Story on Bailm. § 346. However true this doctrine may be, when applied to the ordinary statutes of limitation, it is forbidden by the terms of the statute we are considering, which operates not only on every character of suit which can be commenced by or against an assignee, but on all rights he can assert, or which can be asserted against him.

It is next insisted, that the case is withdrawn from the operation of the statute, because the bankrupts fraudulently con-



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cealed the existence of the debt due them from the association, and the pledge of the stock for its payment, and there was no discovery or knowledge of these facts until the statutory bar was complete. There is no imputation of fraud or of concealment by the association, or by the parties from whom relief is now claimed, and no averment of any collusion between them or the association, and the bankrupts. The fraud of the bankrupts, if it exists, cannot be visited on the parties now invoking the benefit of the statute, who claim no right under them, but whose claims are now, and were when the bankruptcy occurred, adverse and hostile to them. The reason why courts of equity withdraw frauds concealed from the operation of statutes of limitation, as stated by Lord Redesdale, in *Hovenden v. Lord Annesley*, Sch. & Lef. 634, is, *that the statute ought not, in conscience, to run; the conscience of the party being so affected, that he ought not to be allowed to avail himself of the length of time.* It is the conscience of the party perpetrating and concealing the fraud, which is affected, and who is not suffered to invoke the protection of the statute. Parties not connected or colluding with him—of themselves innocent, for whose protection statutes of limitation are intended, cannot be debarred of its benefits by the conduct of strangers, or of those to whom they bear hostile relations. If it be conceded that the bill discloses concealment and fraud by the bankrupts, which would prevent them from pleading the statute, it will not avail the appellant. Fraud is not imputed to the appellees, and it is their fraud only which will avoid their reliance upon the statutory bar.

These were the conclusions of the Chancellor, and the decree must be affirmed.

## Turner et al. v. Kelly.

### *Bill in Equity for Settlement and Division of Decedent's Estate.*

1. *Heir; title to lands of ancestor dying intestate.*—*Eo instanti*, the death of the ancestor, the title to lands of which he was then possessed, vests in the heir, giving him the right to maintain an action for their recovery and for the rents; but the personal representative of the deceased may intercept the descent, claim the possession of the lands, rent them out and obtain orders to sell them for the payment of debts and for the purposes of administration.

2. *Hotchpot; value of advancement, brought into, how estimated.*—On the distribution of a decedent's estate, when advancements are brought into hotch-

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pot, the statute (Code, § 2265) requires that they shall be estimated at the value, if any, specified in the conveyance, and in other cases, at their value when made; the shares in partition or distribution are, as to the corpus of the property, to be valued as of the time when they become the actual property of the heir or distributee.

**APPEAL from the Chancery Court of Mobile.**

Heard before Hon. H. AUSTILL.

H. H. Slatter died intestate, in Mobile, in September, 1853, leaving four heirs at law, viz: Shadrach and Hope H. Slatter, Emma C. Kelly, (the appellee), and Ann P. Holly; Mrs. Holly died afterwards leaving two children, Anna G. Turner and Henry Holly, who are the appellants in this case. On the 12th of November, 1851, the intestate made an advancement to his daughter, Mrs. Holly, of certain real estate situated on the east side of Royal street, in the city of Mobile. Mrs. Kelly acquired the interests of the other distributees of the estate, except that owned by the children of Mrs. Holly, and on the 29th of November, 1871, filed her bill against them, setting forth the facts above stated, and averring that the property could not be equitably divided, and that a sale was necessary for the purpose of division. The bill prayed that the land should be sold for division; that the value of the land given to Mrs. Holly should be charged as an advancement on the distributive share of her children, in their grandfather's estate. It was agreed between the parties, that the value of the advancement to Mrs. Holly, at the time when it was made, was six thousand dollars; that the value of the property situated on the west side of Royal street, at the death of the intestate, was eighty-five thousand dollars. There was a brick building on the lot given to Mrs. Holly, which several years after the death of the intestate, was burned down, leaving the lot worth 5,000 dollars at the time the bill was filed. The property on the west side of Royal street was estimated to be worth about 25,000 dollars at the time of the filing of the bill. The Chancellor decreed that to the net proceeds of the sale of the property on the west side of Royal street, must be added six thousand dollars as the value of the real estate on the east side of Royal street, and the interest of the appellants to be one-fourth of the aggregate sum of these two amounts, and that from this the six thousand dollars advanced to their mother must be deducted. This decree is assigned as error

W. BOYLES, G. Y. OVERALL, and T. A. HAMILTON, for appellant.—The partition should be directed only on equitable principles.—11 N. J. (38 Stock.) 201; 40 Conn. 274. The

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rights of parties in the proceeds of the sale are the same as in the lands.—*Warfield v. Crane*, 4 Abb. (N. Y.) 525. The share of the appellees in the property should be ascertained thus— $\$85,000 \div \$6,000 = \$91,000 \div 4 = \$16,750$ ; hence, their share in the property on the west side of Royal street would be as follows: As  $\$85,000$  is to  $16,750$ , so is  $25,000$  to——. There is no reason why their relative share of the property should be changed because the value is changed.—*Toomer v. Toomer*, 1 Murphy, (N. C.) 93. There is no reason why there should be one rule as to advancements and another for the remainder of the estate between the same parties. There is no equity in valuing the advancement, which the statute makes part of the estate, (Code § 2262), by one rule, and the balance of the estate by another.—3 Yerg. 112. The property should be valued as at the time of the intestate's death. 3 Dana, 378; 1 S. & R. 426; 5 Bush. 88.

JAMES BOND, for appellee.—The property should be estimated at its value when it is to be divided among the parties in interest, and the shares then equalized. This is the uniform course of procedure in this State. The statute prescribes the rule by which advancements are valued, but as it is silent as to the estate proper, it is manifest that the latter is to be taken at its present value, when distributed.—1 Co. Lit. 565. Lands descend to the heirs, but subject to charges and the payment of debts.—4 Kent's Com. 479; 8 Porter, 507; 4 Ala. 122. *Warfield v. Warfield*, 5 H. & J. 459, is directly in point. To adopt any other rule, would be to violate the principle that "equality is equity," for the person to whom the advancement is made, has the sole enjoyment of it until the distribution is made, although the other distributees may take nothing, besides incurring the burdens, and taking the risks incident to the course of administration.

STONE, J.—When one dies intestate, seized of lands, the title descends, and vests *eo instanti* in the heir, who can at once claim the rents, and maintain an action for the recovery of the possession. This is not, however, an absolute right. Under our statutes, lands are made subject to debts, and the personal representation is clothed with the power to intercept the descent, claim the rents and the possession, rent out the lands, obtain an order for their sale and sell them, for the purpose of administration, and to pay debts. This is a mere power, but its assertion suspends the heir's right to the possession; and if the lands are sold, and sold in legal form, to pay debts, it divests the title of the heir, and forever bars



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his right of recovery.—*Calhoun v. Fletcher*, 63 Ala. 574. Under this statutory system of ours, it may, and frequently does happen, that the heir is kept out of the inheritance for a considerable time. And litigation, or other obstructions, may further retard the heir's right to enter.

Mr. Slatter died in 1853, intestate, leaving heirs. The present bill was filed, for division and settlement of the estate, in November, 1871. Why the possession was not sooner claimed, or why the final decree was not pronounced until a quarter of a century after the death of the ancestor, the record does not inform us. It maintains entire silence on the subject. We feel it our duty to presume there was a good and sufficient reason for this delay, or that the heirs at law acquiesced in it.

Our statute—Code of 1876, § 2265—has declared the rule for ascertaining the value of advancements. If the value be expressed in the conveyance, that determines the question. If the conveyance does not express the value, then it is to be estimated according to its value when given. For the value of the shares in partition or distribution, the statute has expressed no standard. Reason would say it should be the value at the time it becomes the actual property of the heir or distributee. This may, and often does work unequally; but the advantage is generally in favor of the one advanced. He pays no rent, hires or interest; and if the advancement exceed in value the distributive shares, he is not required to refund. In this case, where there is alleged to be an extraordinary shrinkage of values, the rule works hardly against the children of Mrs. Holly. This is but the accident of the particular case, and furnishes a very unsafe and unsatisfactory basis for the establishment of the rule invoked, which we can but think is a departure, alike from principle, and from the practice which has generally, if not universally prevailed in this State.

The record in the present case does not inform us on what principle the rents of the lands, of which intestate died seized, were distributed. If there was a surplus of rents over and above the wants of the administration, that surplus should have been distributed among the four heirs, in the same proportion as they would severally share in the residuum of the estate, left after the advancement to Mrs. Holly. This, because she had all the while enjoyed the use and rents of the property advanced to her, and it would be inequitable and unreasonable that she should, in addition to such enjoyment, share equally with her non-advanced brothers and sister, in the residue of the estate.—*White v. White*, 3 Dana,

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374, 377. But as we have said, this question is not raised by the present record.

There is a loose expression—not a decision—in *Burton v. Dickinson*, 3 Yerg. 112, tending to support appellant's theory of this case. *Powell v. Powell*, 9 Dana, 12, seems to adopt the time of division as the true time for fixing the value of the non-advanced property. We think this the correct and only safe rule, so far as the corpus of the property is concerned.—*Warfield v. Warfield*, 5 Har. & J. 459. Rents and hires, as we have shown, fall under a different rule. *Toomer v. Toomer*, 1 Murph. (N. C.) 93, is so meagerly stated, that but little can be gathered from it. True, the opinion says the lands not advanced “ought to be valued at the time of his (decedent's) death.” The report does not inform us what length of time elapsed, if any, between decedent's death and the division, nor is any reason given for the opinion. For aught that we can know, the heirs acquired the possession immediately on the death of the ancestor, and if so, the time of the death was the time to fix the value. These remarks are equally applicable to the case of *Renaker v. Lafferty*, 5 Bush, (Ky.) 88. The case of Dutch's appeal, 57 Penn. St. 461, settled nothing material to this case. Many inequalities and hardships would grow out of the rule appellants ask us to adopt. We need not specify them, as they will occur to every one. We concur with the Chancellor, and his decree must be affirmed.

## King v. Martin.

### *Action for Money had and Received.*

1. *Record; proof of.*—A record is proved by the mere production and inspection of the original, or of an exemplified or authenticated copy.

2. *Same; correction of.*—Parol evidence is not admissible to correct, or explain clerical errors in judicial proceedings, but if an inspection of the entire record clearly discloses their nature and extent, the record corrects itself, and the court will construe it as corrected.

3. *Same; record in this case corrects itself.*—Where a will is set out in a record, and is described as dated Nov. 18, 1873, and subsequently in the judgment of the court, it is stated that it was executed in 1875, the record also showing that the testator died prior to 1875, it is a mere clerical error which the record itself corrects.

4. *Heir; rights of, under civil law of Louisiana to ancestor's property.*—Under the civil law of Louisiana, the rights of the heir to the rights and obligations of his ancestor are transmitted by succession, and *eo instanti* his death, the

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heir acquires the right to take possession of all the ancestor's estate, and the right of possession, which the deceased had, continues in the heir as if there had been no interruption, independent of the fact of possession.

5. *Same; interest in estate governed by domicile of intestate.*—The domicile of the intestate being in Louisiana at the time of his death, and the property in controversy situated there, the nature and quantum of the interest of an heir is governed by the law of Louisiana, and the principle is not changed, although the courts of Alabama afterwards acquired jurisdiction to appoint an administrator, because the intestate died in this State, and assets were subsequently brought into Alabama.

6. *Same; when may maintain assumpsit to recover distributive share.*—Where M., a resident of Louisiana, died in Alabama leaving a will, by which he gave all his property to J. and A., (who were also heirs), and pending proceedings in the courts of Louisiana by M., another heir, to annul the will, the executor therein, brought the property to Alabama and delivered it to J. and A., the Supreme Court of Louisiana subsequently declaring the will void, *Held*: 1. That, under the laws of Louisiana, the interests of A. and J. and M. were in the nature of a tenancy in common; 2. That M. could recover her share of the estate of the intestate by an action of assumpsit, for money had and received, against J. and A. respectively.

7. *Separate estate of wife, when husband must join in suit for.*—The provision of the statute allowing the wife to sue alone, (Code, § 2892), when the suit relates to her separate estate, refers only to the estate created by the laws of Alabama, and not to those created by the laws of any other State; and where the wife has an interest in the suit under the laws of such State, the husband is a proper party plaintiff.

#### APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

John Martin, a citizen of Louisiana, and domiciled there, died on July 21, 1875, at Bladen Springs, Alabama. He left no children, and his next of kin were his sisters, viz: Mrs. M. A. King, the appellant, and Mrs. Robinson, who resided in Ohio, and his neices, Almira and Josephine Martin, and a brother, who reside in Mobile, Alabama. The property of the deceased, which consisted altogether of "movables," was located and collected together in New Orleans. Before his death, he undertook to make a will, by the terms of which he gave all his property to his neices, Almira and Josephine, appellees in this case, as "universal legatees." This instrument was presented for probate by J. P. Vairien, the executor named therein, and on July 26, 1875, was admitted to probate by the District Court of New Orleans. At the suit of appellant, the will was set aside and declared void by the District Court, and this decision was affirmed by the Supreme Court of Louisiana. Pending the litigation as to the validity of the will, the executor, Vairien, collected the property of the estate, converted it into money, brought it to Mobile, and delivered it to the appellees. H. W. King, husband of appellant, was appointed by the District Court of New Orleans, the administrator of the estate of John Martin. In the petition filed by appellant to annul the will, she alleged that it was



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made on the 18th of November, 1875, and the court entered a decree annulling the will, as made on the 18th of November, 1875. The will is set out in the record, and was stated to have been made on the 18th of November, 1873. Appellant brought an action of assumpsit, without joining her husband as plaintiff, for money had and received, against Almira Martin, and a similar action against Josephine Martin, to recover her distributive share of her brother's estate. The facts of the two cases were alike and they were submitted together to the court for decision. The defendants pleaded in abatement, that the plaintiff was a *feme covert*, and domiciled in Ohio, and that the cause of action did not arise under the laws of Alabama. Plaintiff replied to this plea, by setting out the laws of Ohio, and showing that the property in controversy was a part of her separate estate thereunder, and that she could sue alone to recover it. The defendants demurred to the replication: 1. Because the laws of Ohio do not govern the proceedings in the courts of Alabama; 2. Because the replication did not show that the plaintiff had any separate estate under the laws of Alabama. On the trial, the plaintiff introduced in evidence the civil Code of Louisiana, §§ 867, 882, 870, 889, 936, 908, and 8 La. An. 431; besides other sections of the Code, and decisions of the courts of Louisiana, not necessary to be set out here. The case was submitted to the court without a jury, and as there was no evidence for the defendants, no special finding was made, but the court rendered judgment generally for the defendants. The appellant excepted to the ruling of the court, that the plaintiff was not entitled to recover on the evidence and to the rendition of judgment for the defendants. The rendition of the judgment, and the ruling of the court, are assigned as error.

BOYLES, FAITH & CLOUD, for appellant.—The date of the will in the petition filed by appellant in the court at New Orleans, is a mere clerical error, as is shown by other recitals in the record. When the will was annulled the succession became open to the heirs as though no will had been made. Code, La. § 882. The property descended to the heirs and vested in them a title which was good everywhere.—Story's Con. Laws, 481, 482; 45 Ala. 410; 11 Martin, 713. The removal of the property to Alabama can not operate to divest a title given by the laws of Louisiana, and this title is respected by the courts of this State.—2 Ala. 631; 11 Wh. 361; 19 Ala. 590. The laws of Louisiana gave appellant a legal title to a share in the property of her deceased brother,

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and the courts of Alabama will enforce her rights by an action for money had and received. Under the civil Code of Louisiana the property of a decedent descends equally. Succession is the right by which the heir can take possession of the estate of the ancestor; it is also the transmission of the rights and obligations of the deceased to his heirs, and it becomes open by the death of the ancestor.—Code La. §§ 867, 870, 928. The right to possession is continuous. Code, La. § 936; the heirs have all accepted the succession as evidenced by these suits; the property belongs to them equally, and they have each become an undivided proprietor of the effects of the succession.—Code, La. § 1214; 27 La. An. 503. The property vests immediately on the opening of the succession, in the heir, and being tenant in common, if one gets possession of it and denies the rights of the others, and converts it, an action of trover will lie or the co-tenant may waive the tort, and bring assumpsit for money had and received.—20 Ala. 212; 30 Ala. 341. The heirs may sue for the property independent of an administrator.—8 La. An. 431; 6 La. An. 403; 8 La. An. 228; 2 La. An. 299; 2 La. An. 475; 15 La. An. 527. These cases were introduced in evidence and this court will regard them as authoritative expositions of the law of Louisiana.—34 Ala. 565; 31 Ala. 9; *Ib.* 575. The form of remedies and the order of judicial proceedings are governed by the law of the place where the action is instituted.—Story on Con. Laws, 558.

STEWART & PILLANS, for appellees.—It was not the will of 1873, under which the appellees hold the property in controversy, which was annulled by the courts of Louisiana, but a will of 1875. This court does not assume the power to correct mistakes in, and to reform, the decrees of the courts of sister States.—33 Ala. 282; 15 B. Monroe, 364, 379; 24 Ga. 397. By the evidence of the record, appellees are rightfully in possession. But, even in case of intestacy, the appellant can not recover, for in Alabama no distributee can sue at law, (1 Stew. 536; 11 Ala. 614; 26 Ala. 456; 34 Ala. 581; 1 Ch. Pl. 101, (note A.); 1 Wms. on Ex'rs, 508-9), and plaintiff could only receive her share through an administrator. 29 Ala. 355. The heir, claiming as such, must accept before administration had, because the acceptances relates back to the death of the ancestor. Appellant's husband took out letters of administration in Louisiana, thus showing an acceptance with benefit of inventory, and in such cases administration is required and no part goes to the heir until the estate is administered on.—21 La. An. 364; 5 La. An. 645;

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6 La. An. 212; 2 La. An. 303; Code La. §§ 1025, 1034. Until the heir accepts he has no title, (Code, La. § 999), and a married woman can only accept by the authority of her husband, given in writing.—Code, La. § 999. No such authorization was shown, and the suits do not show any acceptance because they were not brought in Louisiana, and no suit is shown to have been brought there which could have that effect. Appellees claim not as heirs but as supposed legatees. The mere existence of a title to a share in the effects of a decedent, does not give the owner a right to sue for them in Alabama.—59 Ala. 502; 9 Wall. 399; 2 Lomax on Ex'rs, 297. If appellant can sue at all, she must sue jointly with her husband. The suit concerns property in which she is interested, but which is not her separate estate.—*Gerald v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532. Whatever the Ohio law be, it can have no operation here.—Rorer on Inter-State Law, 52–53; hence, if there was error in the finding of the court, it was without injury, as the plaintiff could not recover when suing alone.

SOMERVILLE, J.—A record is proved by its own mere *production and inspection*, without more, whether of the original or of a copy.—1 Greenl. Ev. § 501. And while parol evidence is not admissible to correct, amend or explain any clerical error which may have crept into judicial proceedings, as evidenced by an exemplified or authenticated transcript, if an inspection of the entire record clearly discloses the nature and extent of such error, the record may be said to correct itself, and the court will feel authorized to so construe it. The record of the proceedings of the District Court for the Parish of Orleans, and State of Louisiana, as introduced in this case, on petition of the appellant filed in that court to annul the probate of John Martin's will, and as affirmed on appeal to the Supreme Court of Louisiana, is of this character. The pleadings all clearly show the purpose of the suit. The will is set out *in haec verba*, and described as dated November 18, 1873. The subsequent misdescription, in the judgment of the court, of the *year* in which the will was executed, stating it to be 1875, instead of 1873, is a clerical error manifest on the face of the proceedings, and is rendered more plain and certain, if possible, by the established fact, apparent from the record, that the testator died prior to the year 1875.

We think the evidence competent to prove the annulment and vacation of Martin's will by a court of adequate jurisdiction in Louisiana.



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Under the civil Code of Louisiana, as introduced in evidence, the rights and obligations of the deceased ancestor are, by *succession*, transmitted immediately to his heirs, and they acquire, *eo instanti*, a right to take possession of the estate, real, personal, or mixed, such as the case may be. §§ 867, 870. The heir is considered as seized of the succession from the moment of its being opened, and “the *right of possession*, which the deceased had, *continues* in the person of the heir, as if there had been no interruption, and independent of the fact of possession.”—Art. 936. He is thus seized of the estate, and becomes entitled “to take possession of the estate, and dispose of it as he pleases, subject only to legal restraint by the creditors, and under the responsibility of paying the debts of the succession.”—*McMaster v. Place*, 8 La. An. Rep. 431. It is thus obvious that the appellant and other lawful heirs of John Martin, the decedent, acquired by inheritance a community of interest, in the nature of a tenancy in common, in the estate of the deceased.

The nature and *quantum* of this interest is governed and determinable by the laws of Louisiana, the domicile of the intestate being in that State at the time of his death; and the property in question being subject to that jurisdiction.—Story on Conf. Laws, §§ 481, 482, 558. This principle is not changed by the fact that the courts of Alabama afterwards acquired jurisdiction to appoint an administrator, by reason of the death of the decedent in this State, and the subsequent bringing of assets into this State, (Code 1876, § 2349). The rights of heirs, as vested by succession under the civil law, could not be thus divested, unless, perhaps, by administration granted for the payment of debts.

The proof of heirship being satisfactory, the action of *assumpsit* for money had and received was the proper remedy. This action, in its spirit and purposes, has been likened to a bill in equity, and is an exceedingly liberal action, and will always lie where a defendant has in his hands money which, *ex equo et bono*, he ought to refund to the plaintiff.—1 Greenl. Ev. § 102, 117. And as the action of *trover* will lie by one tenant in common against his co-tenant for the conversion of a chattel, so he can waive the *tort* and sue in *assumpsit* if he so elect.—*Perminter v. Kelly*, 18 Ala. 716; *Smyth v. Tankersley*, 20 Ala. 212; *Fanning v. Chadwick*, 15 Amer. Dec. 233.

The judgment of the Circuit Judge in this cause, which was rendered without a jury, under the provisions of sections 3029 and 3030 of the Code, is, we think, erroneous, and is hereby reversed, and the cause is remanded for further procedure.

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The complaint should, however, be amended in accordance with the objection taken by demurrer to plaintiff's replication filed to the defendant's plea in abatement. The *lex fori* governs as to all forms of remedies and modes of proceeding in legal actions.—Sto. Conf. L. § 556. Section 2892, (Code, '76), authorizing the wife to sue alone, where the suit relates to her "separate estate," has reference only to her separate estate created under the laws of Alabama, and not under those of Ohio, or any other foreign jurisdiction.—*Pickens v. Oliver*, 29 Ala. 529. The wife having an interest, as disclosed by the statute laws of Ohio introduced in evidence, and the property sued for not being her statutory separate estate, under the laws of this State, the husband is a proper party plaintiff, and should be joined with the wife.

Reversed and remanded.

## Williams v. The State of Alabama.

### *Indictment for Burglary.*

1. *Courts; power to adjourn after opening of term.*—When the term is regularly opened, at the place appointed by law, courts have the inherent power to adjourn to any other day of the term; and when the court is authorized to continue "until the business is disposed of," it may adjourn to any day before the commencement of the next term.

2. *City Court of Mobile; power of to adjourn.*—Under the provisions of the act of January 15, 1877, to regulate the sessions of the City Court of Mobile, the terms for criminal business may continue until the business is disposed of, and the court having met at the time and place appointed, it has the inherent power to adjourn for a week, and organize a grand jury when again in session on the day to which it was adjourned.

3. *Burglary, what sufficient statement of value in indictment for.*—In an indictment for burglary, which avers that defendant, "with intent to steal, broke into and entered the store of H, in which goods, &c., things of value, were kept for use, &c.", sufficiently shows that things of value were kept therein, at the time of the breaking and entry, and is good.

4. *Plea in abatement, as to drawing grand jury; what must negative.*—A plea in abatement, which negatives the presence of the clerk of the Circuit Court at the drawing of the grand jury, but does not negative the presence of the clerk of the City Court, is bad.

5. *Ownership; how to be averred in indictment.*—When it is necessary in an indictment, to aver the ownership of property, it is sufficient to lay it in any one or more of several partners or owners.

6. *Age; when no disqualification for jury service.*—A man qualified to serve as a juror, is exempt when he reaches the age of sixty years, but such exemption is a personal privilege, which he may waive or assert. Age does not disqualify, unless the person is under twenty-one or over seventy years of age.

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APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

Appellant was indicted for burglary, at the November term, 1880, of the City Court of Mobile. The indictment contained two counts, in which it was alleged : " That Williams, with intent to steal, broke into and entered the shop, store &c., or other building of Hopkins, in which goods, merchandise and things of value were kept for use, sale, or deposit, against the peace," &c. The defendant demurred to the indictment, because it did not aver, at what time things of value were kept in the building charged to have been broken and entered, and because it did not aver that the particular things kept in said building, were things of value, nor what the valuable things were. The court overruled the demurrer. Defendant then pleaded in abatement, that " the grand jury that presented this bill were not organized as required by law, but were told by the court that they could go, but must return on the 22d of November, without specifying in the order what 22d of November was meant, thereby adjourning the court without day ; and because the grand jury were not drawn and summoned in the presence of the probate judge, sheriff, and clerk of the Circuit Court, as required by law, and were not summoned to appear on the 22d of November." A demurrer to this plea by the State was sustained. The defendant then pleaded " not guilty," and a jury was called to try the case. Among them was one Hamilton, who being questioned at the request of the defendant, as to his age, stated that he could not state it precisely, but thought he was sixty-eight years of age, and " passed for that age." The defendant objected to this juror, but the court overruled the objection and the defendant excepted. On the trial, it was shown that the room broken and entered, was leased by one Hopkins ; that Hopkins had sub-let the front half of the room to the Atlantic & Pacific Telegraph Company ; that it was occupied by the said company at the time of the breaking and entering, and was only separated from the other half of the room by a railing, about four feet high ; that the door, which was broken open, and through which the entry was made, was in that part of the room occupied by Hopkins and Diard, who were partners in trade ; and that several articles were stolen from that part of the room occupied by Hopkins, and nothing from that part occupied by the Telegraph company. From the minutes of the court it appears that the judge of probate, sheriff, and clerk of the *City Court of Mobile*, met on October 13, 1880, and drew the grand jury by whom the bill against the appellant was found. It also



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appears, that the court met on the 15th of November, 1880, but adjourned until November 22, 1880, and on that day met and organized the grand jury. The defendant asked the court to charge the jury, "if they believe from the evidence, that Hopkins and Diard occupied the room in the building broken and entered, as a firm, at the time of the breaking, and the Atlantic and Pacific Telegraph Company occupied it in part, and as joint tenants of the same room, defendant can not be convicted under this indictment." This charge the court refused to give and defendant excepted.

The defendant was convicted, and the rulings of the court on the demurrers to the indictment, and the plea in abatement, as well as its action in overruling defendant's objection to the juror, Hamilton, and the refusal to give the charge above set out, are assigned as error. Numerous other exceptions were reserved, which the opinion of the court renders it unnecessary to notice.

COBBS & TOMPKINS, for appellant.—The judge adjourned the court for more than three days, and hence it stood adjourned, by operation of law, for the term.—Code, § 660. The indictment is bad; it fails to aver that things of value were kept in the building at the time it was broken and entered. The language of the statute is "where, &c. or other valuable thing is kept." The language of the indictment is, that "valuable things *were kept*," &c. Being founded on a statute, it should clearly allege every fact which enters into, and is an ingredient of the offense.—*Rowland v. State*, 55 Ala. 210. Hamilton was an incompetent juror. His competency should have been affirmatively shown. The charge requested by appellant should have been given.—*East's Pl. Cr.* 500; 1 Russ on Crimes, 807, 826; 2 *East's Pl. Cr.* 513; 1 *Chit. Cr. Law*, 215, *et seq.*; 3 *Ib.* 1096.

H. C. TOMPKINS, Attorney-General, for the State.—The power of the court to adjourn to a future day of the term is inherent.—*Revels v. State*, 20 Ga. 275; *People v. Northup*, 50 Barb. 147. Section 660 of the Code does not apply to this case, it only applies where the court has not convened; the court had the power also to adjourn the grand jury and order them to appear at another day of the term, for they were subject to the orders of the court.—*State v. Reid*, 20 Iowa, 422; *Clem v. State*, 33 Ind. 424. The plea in abatement was insufficient, for the jury was drawn in the presence of the clerk of the City Court. The averment of the value of the goods, &c., in the indictment was sufficient.—*Hurt v. State*,

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55 Ala. 214. The charge as to the ownership of the room broken and entered was correctly refused.—2 Bish. Cr. Pr. 139 (note); Acts of 1878-9, p. 46.

BRICKELL, C. J.—The act approved January 15, 1877, “to regulate the sessions of the City Court of Mobile,” provides “that the terms of said court for criminal business shall commence on the first Monday in February and June, and the third Monday in November, and continue until the business is disposed of.” The terms for civil business, it is provided, shall commence on the first Monday in November, April, and July, and continue until the last days of each of said months. The judge of the court is by the terms of the act, clothed with discretion to extend the criminal into the civil terms, whenever in his judgment the criminal docket may require, and the civil docket admit of it.—Pamph. Acts, 1876-7, p. 170. The court was convened on the third Monday in November last, for criminal business, but a solicitor for the county not having been elected by the General Assembly, the court was adjourned without organizing the grand jury, until the succeeding Monday, November 22, 1880. On that day, the court re-assembled, the grand jury was duly organized, and subsequently returned into court, the bill of indictment upon which the appellant was convicted. It is now insisted, that the court was without power to adjourn for a longer period than three days, and that having adjourned for a longer period, it was not a court—the essential element of jurisdiction, *time*, a term appointed by law, was wanting. But when the term is regularly opened at the place appointed by law, the court, whether it is, as is the City Court, a court of general jurisdiction, or a court of limited jurisdiction, has the inherent power, (if it is not by positive legislative enactment, prohibited), to be exercised of its own discretion, [to adjourn] to any other day of the term. If, as in the case of the City Court, the only limitation of the term, is until the business is disposed of, the adjournment may be to any day before the commencement of the next term. *Lewis v. Intendant*, 7 Ala. 85; *Revel v. State*, 26 Ga. 275; *People v. Northup*, 50 Barb. 147. The power may be, as is insisted, capable of abuse; but there is no indication in the present record, that it was not justly and discreetly exercised by the city judge. All courts are of necessity entrusted with very large discretionary powers which are capable of misnse, or of abuse; but this capacity is an argument for care in exercise, and not in denial of the existence of such powers.

The proper construction of the indictment is, that things

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of value, were, at the time of the breaking and entry of the building, kept therein for sale, use, or deposit, and it is good under repeated decisions of this court.—*Hurt v. State*, 55 Ala. 214.

The plea in abatement negatives the drawing of the grand jury in the presence of the *clerk of the Circuit Court*, but does not negative the presence of the *clerk of the City Court*. The presence of the latter with the judge of probate, and the sheriff, is sufficient under the provisions of the statute. Code of 1876, § 4733. It is shown affirmatively by the record, that the grand jury was drawn in the presence of the probate judge, sheriff, and clerk of the City Court. There was no error in the rulings of the City Court on this plea.

It is sufficient, when necessary in an indictment to aver the ownership of property, to lay it in any one or more of several partners or owners.—Acts 1878-7, p. 46.

A person having the other requisite qualifications is exempt from serving on juries, grand or petit, when he has reached the age of sixty years. The exemption is a personal privilege, which he may, in his own volition, waive or assert. Age is a disqualification only when the person has not attained twenty-one years, or is above seventy years.—Code of 1876, § 4884.

We have examined the numerous questions presented by the record. There is no error in them available to the appellant, and it would serve no useful purpose to prolong this opinion by passing upon them in detail.

The judgment of the City Court is affirmed.

## Grigg v. Swindal.

### *Bill in Equity to Cancel Conveyance as Fraudulent.*

1. *Conveyance; when equity will not cancel at suit of purchaser under execution.* A purchaser at sheriff's sale, under execution, of lands fraudulently conveyed by the judgment debtor, has a plain and adequate remedy at law by an action of ejectment, and can not come into equity, while out of possession, to have the conveyance cancelled as a cloud on his title.

APPEAL from Clay Chancery Court.

Heard before Hon. N. SMITH GRAHAM.

This was a bill filed by Annie M. Grigg, against Owen



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Swindal and others. The bill shows that a decree was rendered against Owen Swindal, as administrator of the estate of M. Wood, deceased, on the 9th of April, 1869, for about three thousand dollars, in favor of M. J. Wood, one of the distributees of the estate, by the probate Court of Montgomery county; that execution was issued on this decree, and was levied on a tract of land in Clay county, Ala. This land was, on the first Monday in July, 1876, sold by the sheriff of said county, under the said execution, and the appellant became the purchaser, for the sum of fifteen hundred dollars. A deed to the land was executed and delivered to her by the sheriff. The bill states that a short time before, or after the rendition of the decree, the appellee, Swindal, made conveyances of all his real property to certain parties, who are named in the bill; that among these conveyances, was one attempting to convey the same land which had been purchased by the appellant at execution sale; that all these conveyances were voluntary, and were made by Swindal for the purpose of hindering, delaying and defrauding his creditors. Such are the material averments of the bill, which prays that the conveyance of the land levied on and sold by the sheriff to complainant, (appellant), be declared fraudulent and void, and that it be delivered up to be cancelled; that she should be declared entitled to the land, and that an order be made to put her in possession, and that an account be taken of the rent of the land since her purchase. The defendant demurred to the bill, on the ground that the complainant had a complete and adequate remedy at law. The Chancellor sustained the demurrer, and dismissed the bill, and his decree is assigned as error.

GUNTER & BLAKEY, for appellant.—A judgment creditor may go into equity to have a fraudulent conveyance set aside before a sale of his debtor's property under execution, in order to enable him to realize the fruits of his judgment. *Bank v. Atwater*, 2 Paige, 54; *Pulliam v. Taylor*, 50 Miss. 551; *P. & M. Bank v. Walker*, 7 Ala. 926; *Dargan v. Waring*, 11 Ala. 983. And to do this, it is not necessary that he should first exhaust the legal remedies against his debtor. *Pharis v. Leachman*, 20 Ala. 622. This right is not taken away when he becomes the purchaser at his execution sale. And any one else who purchases at the execution sale, stands in precisely the same position that the judgment creditor would have occupied, if he had been the purchaser.—*Murphy v. Orr*, 32 Indiana, 489.

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GEO. S. WALDEN, for appellee.—Appellant had a complete remedy at law.—*Carter v. Castleberry*, 5 Ala. 277. A fraudulent conveyance is void as against existing creditors of the grantor, and a sale under execution, and a conveyance to the creditor of the property fraudulently conveyed, divests the title.—*Read v. Smith*, 14 Ala. 380; *Hall v. Hayden*, 41 Ala. 242. The bill showed that the appellant was out of possession, and did not aver or prove that there was any obstacle to a recovery at law. The demurrer was properly sustained.

SOMERVILLE, J.—The main question in this case is raised by demurrer to the bill filed by appellant, the ground of the demurrer being that the complainant had a plain and complete remedy at law. The point presented is the same decided in *Smith, Ex'r, v. Cockrell, Adm'r*, 66 Ala. 64, where it was held, that a purchaser at sheriff's sale of lands fraudulently conveyed by the judgment debtor, had a plain and complete remedy by action of ejectment at law, and could not therefore come into chancery, when out of possession, to seek the cancellation of the fraudulent conveyance, as a cloud on his title. I dissented in that case from the opinion of the majority of the court, and have seen no reason to change my views as then expressed. Upon the authority of that case, however, the decree of the Chancellor is affirmed.

## Mobile & Montgomery Railway Company v. Felrath.

*Action for Money had and Received; Plea, nonassumpsit.*

1. *Principal may recover property misused by his agent.*—When an agent has misapplied or misused the property of his principal, the latter may pursue and recover it.

2. *Same; can not recover money misapplied by agent.*—But this principle can not be applied to money which has no "ear marks," and can not be identified. When it passes to the possession of another who acquires it for a valuable consideration, and without notice, it can not be reclaimed.

3. *Check; creditor receiving is holder for valuable consideration.*—When a creditor takes his debtor's check on a bank in payment of his debt, he is a holder for a valuable consideration.

4. *Notice of fact, when imputed.*—A person is chargeable with notice of a fact, when the circumstances were sufficient to put him on enquiry, and the fact could have been ascertained by the use of reasonable diligence.

5. *Money had and received; when principal may maintain against agent*—To enable the principal to maintain an action for money had and received against

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a person to whom the agent has paid the principal's money, in discharge of his own debt, it must be shown that the agent is in default to the principal, and that the latter had not the means of indemnity in his hands.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

The facts are stated in the opinion of the court.

G. L. SMITH, for appellant.—If the defendant had reason to suspect that the money belonged to plaintiff, (appellant), he may recover it.—*Ely v. Norton*, 2 Abb. Ct. App. 19; *Burnham v. Holt*, 14 N. H. 367. The check in this case was signed by the agent, and this was notice to appellee that it was the money of some principal which Priester was using to pay his individual debt. Enquiry at the place of payment would have developed the fact that it was money belonging to the railway company.—*Wade on Notice*, 8 to 11; 2 Ala. 735; *Wilson v. Wall*, 34 Ala. 288; *Herbert v. Hanrick*, 16 Ala. 581; *Harris v. Carter*, 3 Stew. 233; *Scroggins v. McDougald*, 8 Ala. 382. When an agent makes an unauthorized transfer of his principal's money, the latter may recover in trover against the assignee.—*Cook v. Patterson*, 35 Ala. 102; *Leigh v. M. & O. R. R. Co.* 58 Ala. 165; 63 Ala. 102. Appellant could have recovered the check by an action of trover, brought before its payment, and the tort may be waived and assumpsit maintained.—*Upchurch v. Nosworthy*, 15 Ala. 705; *Crow v. Boyles*, 11 Ala. 51; *Strothe v. Butler*, *Ib.* 733; 8 Porter, 181; *Hope v. Claxton*, 62 Ala. 46. The court erred in giving the general charge at the request of the defendant.

C. H. LINDSAY, for appellee. (No brief on file.)

BRICKELL, C. J.—The action is for money had and received, in which the appellant was plaintiff, and the appellee was defendant. The facts as shown by the bill of exceptions, are, that in 1879, one Priester was an agent of the appellant, and was individually indebted to the appellee. In payment of such indebtedness, Priester drew a check on the Southern Bank of Alabama, in words and figures as follows:

"No. 85. MOBILE, June 18, 1879. *Southern Bank of Alabama*:—Pay to Joseph Felrath, or order, two hundred and fifty dollars. \$250. (Signed) R. P. PRIESTER, Agt."

The check was indorsed by the appellee, and the money of the appellant deposited in the bank, was by the bank paid to the appellee, who knew Priester was in the employment of the appellant, but did not know in what capacity or



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for what purpose. Prior to commencement of suit, appellant demanded the money of the appellee, and payment was refused. This was all the evidence, and the appellant requested the court to charge the jury, if they believed the evidence they must find a verdict in its favor. The instruction was refused, and on request of the appellee, the jury were instructed to find a verdict for him on the evidence. The instructions given and refused are the matter of the errors assigned.

The general proposition upon which the appellant relies, that a principal may pursue his property, or his money, which his agent may have misapplied, is not doubted. From the necessity of the case an exception obtains as to money, or that which is a circulating medium used and employed as money. Having no "ear marks," not capable of being identified and distinguished, if the agent misuses or misapplies it, and it passes to the possession of one, upon a valuable consideration, and without notice, it may not be reclaimed.—*Burnham v. Holt*, 14 N. H. 367; *Mason v. Waite*, 17 Mass. 560; *Frazier v. Erie Bank*, 8 Watts & Serg. 18.

Taking the check in payment of the debt of Priester, the appellee was a holder upon a valuable consideration. Actual notice that the check was drawn on funds not belonging to Priester, is not imputed. Notice, it is argued, must be implied from the addition of the letters *Ag't*, to the signature to the check, which, it is said, were sufficient to excite the attention of the appellee, and put him on inquiry, and inquiry at the bank would have led him to knowledge that the funds on which the check was drawn, were the funds of appellant, which Priester could not employ in paying his own debts. It is true, if the addition to the signature ought to have put the appellee on inquiry, and reasonable diligence, not the utmost caution and circumspection, would have led him to the discovery that the funds on which the check was drawn were the funds of the appellant, which its agent was misapplying, notice may be imputed. Whether this addition to the signature ought to have put the appellee on inquiry, it is not necessary, in view of the facts of this case, to consider.

The present action is only maintainable on the theory that the appellee has money which, *ex equo et bono*, belongs to the appellant.—1 Brick. Digest, 140, § 72. It is an essential element of the appellant's right of recovery, that Priester was as agent in default, not having accounted for the money paid to the appellee. Of such default there was no evidence given, and it is consistent with all the evidence, that though

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he may have misapplied the funds of the appellant, he has accounted for the misapplication, or that the appellant has in its own hands the means of indemnity. Mere fraud without damage gives no cause of action; the two must concur before an action will lie, and it is as necessary for a party complaining to prove the one as the other. If this were not true, the appellant could recover this money of the appellee, and Priester immediately recover it from the appellant. The fact, if it be a fact, that Priester was in default, and that the appellant had not in its own hands the means of indemnity, lay peculiarly within its own knowledge, and without evidence of it, there could be in no aspect of the case, a right of recovery against the appellee. If there could be a presumption indulged in reference to it, the presumption would be against the appellant, and not in its favor. All presumptions are in favor of honesty and good faith, and not against them.

Affirmed.

## George v. George.

### *Bill of Review for Error apparent on the Record.*

1. *Bill of review; when statute of non-claim, no ground for.*—A bill of review, for error apparent on the face of the record, filed by the minor heirs of a decedent, on the ground that it appeared from the bill in the original suit, that the claim sought to be enforced thereby was barred by the statute of non-claim, cannot be maintained when it appears that the purpose of the original suit was to declare and enforce a lien on, and to recover an interest in, real property.

2. *Same; what irregularity of service on infants not ground for.*—A bill of review for error apparent, will not lie at the instance of the infant defendants to the bill in the first suit, on the ground that the guardian *ad litem* appointed to represent them was not served with notice of his appointment, when it appears from the record, that he was appointed, that he filed his written consent to act, and put in an answer denying the allegations of the bill.

3. *Same; all presumptions are in favor of correctness of first suit.*—When a bill of review is filed for error apparent on the record, it is the duty of this court to presume everything in favor of the rulings of the court in the original suit, which the bill of review does not disprove.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

All the facts which are necessary to be set out are stated in the opinion of the court.

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HANNIS TAYLOR, for appellant.—It affirmatively appeared from the bill in the original suit, that the claim asserted therein was barred by the statute of non-claim, not having been presented to the administrator, or filed in the probate court within eighteen months after the grant of letters. Implied, or constructive trusts, are within the statute of non-claim. *Tarleton v. Goldthwaite*, 23 Ala. 346; 2 Brick. Dig. 218. The statute of non-claim operates not only on the remedy, but it absolutely extinguishes the right.—*Halfman's Ex'r v. Ellison*, 51 Ala. 545. The claim, then, which the original bill was filed to enforce, was extinguished when the bill was filed. The heir has the right to plead the statute of non-claim, which was designed for the protection of all parties interested in the estate. A bill of review will therefore be sustained for the benefit of the minor heirs.

No process was ever served on the guardian *ad litem*, and the attempt by the guardian *ad litem* to give the court jurisdiction over the minors by consent, was void.—*Preston v. Dunn*, 25 Ala. 512. "When service might have been, but was not, perfected on an infant, it is an irregularity which is fatal on error."—1 Ala. 379, 6 *Ib.* 473; *Rowland v. Jones*, 62 Ala. A bill of review will lie to review the whole proceedings except the testimony.—*McDougald, Adm'r, v. Dougherty*, 37 Ala. 409.

PETER HAMILTON, for appellee.—The statute of non-claim has no effect. The claim set up in the original suit was not for a debt, but for an equitable interest in lands, and like the claim to enforce the vendor's lien, does not require presentation.—61 Ala. 536; 26 Ala. 312; 43 Ala. 434. Non-presentation does not discharge the lien of a mortgage, (1 Ala. 708; 2 Ala. 331); nor does it discharge sureties for the debt.—28 Ala. 762. It does not appear from the bill, that proof of presentation was not made, and the court on a bill of review for error apparent, will not look to the evidence to see if it supports the decree.—39 Ala. 409. The Chancellor recognized the guardian *ad litem* appointed for the infant defendants, and he appeared and answered for them; this was sufficient to maintain the decree on bill of review, for although not strictly regular, it was far from being void.—26 Ala. 507; 2 Stew. 214; 1 Dan. Ch.

STONE, J.—An original bill was filed by Jane A. George, surviving wife of William H. George, deceased, against appellants and another, who were infant children, and the only issue of the marriage between the said William H. and Jane A. George. The said Jane A. was administratrix of Wil-



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liam H., her husband's estate. The purpose of the bill was to have a trust declared in favor of the complainant in a lot with its improvements in the city of Mobile, for moneys of the complainant, which were invested by the husband and trustee in the improvement of said lot. In accordance with the prayer of the bill, the Chancellor decreed "that a trust should be declared in favor of complainant in said lands and premises to the extent that five thousand five hundred and forty-seven dollars [bore] to eight thousand eight hundred and twenty-eight 76-100 dollars, the cost of the said land and premises—and a trust, and undivided interest, in said proportion, [was] decreed in favor of the complainant in and to said lands, and she [was] vested with the title to such lands and premises conjointly with the defendants, [heirs at law], in the ratio and proportion stated." Five thousand five hundred and forty-seven dollars was the sum of the wife's money which the Chancellor ascertained had been put in the improvements by the husband. As a reason for making the decree in the form stated, the Chancellor employs this language: "The court considers and decrees that it is to the interest of the defendants that a trust should be declared in favor of the complainant in said land and premises to the extent," that her money employed bore to the cost of the whole lot and improvements. He then adopted the plan of giving her a proportionate interest in the property, rather than to declare a lien and order a sale of the property for its payment. This was probably beneficial to the heirs, for improved property, except in favored localities, rarely commands a sum sufficient to cover the investment and improvements. When the bill was filed, and that decree rendered, two of the heirs, complainants in the bill hereafter noticed, were infants of tender years, each under the age of fourteen.

The present suit is a bill of review, instituted by the two infant heirs mentioned above, and prays a review and reversal of that decree, for alleged error apparent on the face of the record. The bill was filed before either of the complainants reached the age of twenty-one years, and filed by next friend. It assigns five separate errors; but in the argument of counsel, only two of the five are insisted on. We will notice only those which are here urged in argument. The language employed in one of the assignments of error is as follows: "Because said bill alleges that the claim or charge set up in it against the land of your orators, was an implied or resulting trust, or a moneyed demand which should be charged on said land, all of which are subject to the operation of the statute of non-claim. Said bill affirmatively shows that the said claim was not presented as the law

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requires to the administratrix of said estate, within eighteen months after the grant of letters of administration. It is therefore manifest, upon the face of said bill, that the claim asserted therein, whether a resulting trust, or a monied demand, was extinguished by operation of the statute of non-claim, long before said bill was filed." If the claim had been for money, as a debt due from the estate, possibly this error would be well taken.—Code of 1876, § 2597. The original bill, however, did not proceed on the theory of a debt due from the intestate. Its purpose was to recover an interest in property, and that purpose was accomplished through the decree of the Chancellor. The gravamen of the bill was, that the husband—trustee—had invested the wife's moneys, her separate estate, in improving the property, and that she was thereby clothed with a lien, which she could and did elect to enforce by having a proportionate part of the property decreed to her. This was not asserting a monied demand against the estate. It was but a claim to property, and not within the influence of the statute of non-claim.—*Doe, ex dem. v. McLoskey*, 1 Ala. 708, 745; *Inge v. Boardman*, 2 Ala. 331; *Mahone v. Haddock*, 44 Ala. 92; *Tilford v. Torrey*, 53 Ala. 120; *Preston v. McMillan*, 58 Ala. 84; *Thames v. Herbert*, 61 Ala. 340. It should be borne in mind that what we have said above relates only to the question of non-claim. We have nothing to do with the correctness of the decree in the first suit, save as it is assigned as error in the bill of review.

The other assignment of error made by the bill of review, and insisted on in argument, is in the following language: "Because said record shows that the said James E. Sherman was never the legal guardian *ad litem* of Anna E. George and Alice J. George, [complainants in the bill of review], inasmuch as the order of this court, under which he might become such, was never executed by the service of process on him, as directed by said order, and said process never having been executed under the order of the court, the said Sherman never acquired any status in said cause." The substance of this assignment is, that Sherman was not served with notice, informing him of his appointment as guardian *ad litem*. The bill of review shows that Sherman filed his written consent to act as such guardian *ad litem*—that he was appointed, and did so act. He put in the customary answer, denying the allegations of the bill. It is difficult to conceive of any injury the complainants suffered, by the omission to serve notice on Sherman of his appointment. Notice was required, and was necessary, only because it was the duty of the court, under the law, to inform Mr. Sherman of the trust and duty cast on him. Information was its sole purpose. The answer

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filed by him proves he did have notice. Why notify him of that which he already knew? If he had been served with notice, would he have answered differently—would he have defended more diligently? An error, to work a reversal on bill of review, must not only be apparent; it must be at least *prima facie* injurious. Errors of form avail nothing.—Adams Eq. 416-7, in margin; Story Eq. Pl. § 411; Mitt. Pl. 102; *Dexter v. Arnold*, 5 Mason, 303; *Haig v. Homan*, 8 Cl. & Fin. 320; *Berdanatti v. Sexton*, 2 Tenn. Ch. Rep. 699, 705; *Fleming v. Stout*, 19 Ind. 328; *Guerry v. Perryman*, 12 Ga. 14.

Another view is, we think, equally fatal to this assignment of error. The bill of review shows that the present complainants were under fourteen years of age when the original suit was instituted and determined. Their father is shown to have been then dead. There is no averment that they had a legally appointed guardian. Being females and of very tender years, it requires no strain to presume they resided with their mother, and that she had the maintenance and charge of them. Her interest, and the claim set up in the suit, was adverse to that of her children. Rule 23 of chancery practice prescribes in what manner infant parties shall be served. It enumerates several classes, and makes special provision for each. This case does not fall within any of the specially enumerated classes. The rule then contains this clause: "And should there be any case not provided for by statute, or by this or some other rule, and proof be made before the Chancellor or Register, he may direct the mode of service, or appoint a guardian *ad litem* for such infant without service." We have, then, the case where the Chancellor or Register was authorized to direct in what manner service should be made, or either of them could appoint a guardian *ad litem* without service. It is our duty to presume everything in favor of correct ruling in the original suit, which the bill of review does not disprove.—*Goldsby v. Goldsby*, at present term. Indulging these presumptions, we feel bound to overrule this assignment of error. There are three other assignments, not insisted on here, but we think there is nothing in them.

The decree of the Chancellor is affirmed.



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### *Statutory Real Action.*

1. "Assets;" word, as used in the Code (§ 2349), includes land.—The word "assets," as used in the statute (Code, § 2349), authorizing the grant of letters of administration on the estates of non-residents, who die, leaving "assets," in the county where such assets are left, includes land.

2. *Alien leaving assets in Alabama; what court administers.*—Letters of administration on the estate of a citizen, and resident of France, who died there, intestate, leaving assets in Alabama, consisting of land only, may be granted by the Probate Court of the county in which the land is situated.

3. *Heirship; proved by decree of Probate Court on settlement of estate.*—In an action of ejectment, by the heirs of a decedent, against the lessees of the administrator, the record of the proceedings of the Probate Court showing the appointment of the administrator, and decrees against him, as such, in favor of the plaintiffs in ejectment, as heirs of such decedent—is admissible to prove the fact of such administration, and the heirship of the plaintiffs. (STONE, J., *dissenting*, held that the lessees of an administrator are estopped from denying the intestate's title to the demised premises, and, on the determination of the administration, can not dispute the title of the heir; but the record of the proceedings in the Probate Court, on the settlement of the administration, does not prove the fact of the heirship of the plaintiffs, in an action of ejectment to recover the land from the lessees, and is, as to them, illegal evidence.)

4. *Tenants may not dispute landlord's title.*—Tenants, and their privies in blood or estate, are estopped from denying the title of the landlord under whom they hold, or of one succeeding to his rights, so long as they continue the possession originally derived from him; and when sued for the possession of the demised premises by the landlord, or one succeeding to his rights, are precluded, as well after the termination, as during the continuation of the lease, from disputing the landlord's title, or from setting up an outstanding title in a stranger.

5. *Same; same.*—Where an administrator recovered, in ejectment, against persons who submitted to his claim as administrator, and subsequently paid him rent, such persons can not, in an action of ejectment for the same premises, brought against them by the heirs of the decedent, dispute the title of the heirs, or set up the fact that the lands have escheated to the State, so long as they continue in the possession derived from the administrator.

6. *Ejectment against several; practice as to judgment entry and assessment of damages.*—In an action of ejectment against several defendants, it is the better practice to have but one judgment entry, with the assessment of damages in severalty; but if the record shows a separate judgment against each defendant, the defect is a clerical error, which can be corrected in the appellate court.

APPEAL from Baldwin Circuit Court.

Tried before Hon. H. T. TOULMIN.

This was a statutory real action, in the nature of an action of ejectment, brought by Rene Louis, Maxime Adrien, and Marie Octave Lalouette, and Gabrielle Morin, wife of Edward Morin, and Ann Delphine Chaudon, wife of Claude

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Felix Chaudon, as the heirs of Antoine P. Lalouette, deceased, against Wm. Bishop, W. A. Lipscomb, G. W. Lantern, and A. C. Styron, to recover certain lands situated in Baldwin county, Alabama. On the trial, the plaintiffs offered in evidence the record of the Probate Court of Baldwin county, showing an order appointing G. B. Hall administrator of A. P. Lalouette, in 1861, and also the final decree of said court on the settlement of Hall's administration, in which it was recited, that Rene Louis Lalouette, and others (who were plaintiffs in this action), were the heirs of said A. P. Lalouette; that they appeared before said court, by their agent, C. Beroujon, had an account stated against the administrator, Hall, and decrees rendered in their favor against him; that said court revoked Hall's letters, and directed the land to be given to plaintiffs. The defendant objected to the introduction of this record, as irrelevant and incompetent evidence. The court overruled the objection, holding that it was admissible to show—1. Hall's appointment as administrator. 2. To show the final settlement of his administration. 3. To show that the plaintiffs, in this case, are the heirs of A. P. Lalouette. To this ruling of the court, the defendants excepted. The plaintiffs also proved that the defendants appeared as witnesses on the final settlement of Hall's administration, and testified as to money paid by them to Hall, as the rent of portions of the land sued for; that some of the defendants were also defendants in a suit brought by said Hall, as administrator, to recover possession of the land in controversy; that there was a judgment rendered in said suit, in favor of said administrator, at the Spring Term, 1867, of the Circuit Court of Baldwin county; that the defendants then leased the lands from Hall, as such administrator, and paid rent from that time until 1873, but had paid no rent since that time; that the defendants had occupied the lands during the whole time. They then proved the value of the use and occupation of the land.

The defendants offered evidence of the possession of several parcels of the land by themselves, and by those from whom they purchased, as far back as 1873. They admitted that they had submitted to Hall's claim as administrator, and had paid him rent. They testified that Hall claimed the land as escheated property, and at the time they submitted to his claim, it was understood that he would apply for an order to sell it, as escheated property, but that no such sale ever took place. They proved, also, that defendants, and persons from whom they had purchased portions of the land, had improved parts of it, before Hall claimed it

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as administrator, and had claimed to own it; that A. P. Lalouette was an alien—a citizen of France—at the time of his death, and that plaintiffs were all natives of France, and domiciled there. The defendants proved, in rebuttal, by official records from France, that A. P. Lalouette died in France April 9, 1855. They proved, by the same records, his marriage in that country, the birth of the plaintiffs, who were proved to be his children, and the fact that they survived him, and resided in France.

The court charged the jury that “if they believed, from the evidence, that these plaintiffs are the children and heirs of A. P. Lalouette, deceased, and that Gerald B. Hall administered on the estate of said Lalouette, and, as administrator, rented the lands in question to the defendants, and defendants were tenants of said Hall, as administrator, then these defendants are estopped from denying the title of these plaintiffs, who stand in the place of said Hall, and are entitled to recover. If you believe the defendants went into possession under Hall, as administrator, then the title of A. P. Lalouette is not in question before you.” The court also charged the jury that the act of February 21, 1870—being an act to carry into effect the consular convention between France and the United States—made the plaintiffs lawful heirs, and gave them inheritable blood, and the defendants are estopped from denying their right to inherit the lands, by their renting from Hall, as administrator. Several charges were requested by the defendants, asserting the converse of these propositions, and that the plaintiffs took no title to the property, which, the charges asserted, had escheated to the State. These charges the court refused to give, and defendants excepted to the refusal of each charge. The jury brought in four verdicts, each in favor of the plaintiffs, and against the four defendants, respectively, and there was a separate judgment rendered against each one of them. The admission of the record of the proceedings of the Probate Court of Baldwin county, the giving and refusal of the several charges, and the rendition of the four separate judgments, are assigned as error.

ANDERSON & BOND, and JOHN ELLIOTT, for appellants.—The Probate Court had no jurisdiction to grant letters of administration on Lalouette's estate, for there were no “assets” in Baldwin county, in the sense in which that word is used in the Code of 1852 (§ 1667); nor was there any privity of estate created between Hall and the children of Lalouette by and through his acts as administrator. The transcript of the record of the proceedings in the Probate Court of Bald-



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win county, on the final settlement of Hall's administration, was clearly incompetent to prove that appellees were the heirs of A. P. Lalouette.

THOS. H. PRICE, for appellees.—The judgment in favor of Hall against these defendants, who became his tenants as administrator, is conclusive in this action, because of the privity between Hall, as administrator, and the appellees. 2 Brick. Dig. 203, § 45. If Hall were suing, appellants could not dispute his title.—*Hill v. Huckabee*, 52 Ala. 155. Appellants are concluded by the decree in the Probate Court against Hall.—*Lalouette v. Lipscomb*, 52 Ala. 570; *Powell v. Washington*, 15 Ala. 803; *Lamkin v. Heyer*, 19 Ala. 229; *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92. A tenant can not deny his landlord's title.—*Russell v. Erwin*, adm'r, 38 Ala 44; *Clarke v. Clarke*, 51 Ala. 498. For this reason, also, the defendants can not defend on the ground that the land had escheated to the State.

SOMERVILLE, J.—The Code of 1852 (§ 1667) conferred on courts of probate authority to grant letters of administration within their respective counties, among other contingencies, "where the intestate, not being an inhabitant of the State, dies out of the county, leaving *assets* therein"—the same provision occurring in section 2349 of the present Code (1876). The word "*assets*," as here used, includes both *real* and *personal* assets, and, therefore, comprehends land or real estate, according to its ordinary signification. 1 Bouv. Law Dic. title Assets. Such property was and is expressly charged, by statute, with the payment of the decedent's debts, and is estimated in fixing the penalty of the administrator, or executor's bond.—Code 1852, §§ 1737, 1683. The rents were lawfully collectable by the personal representative, and he could maintain ejectment for it, then as now.—§ 1751; 1 Brick. Dig. p. 625, § 6.

The Probate Court of Baldwin county clearly had jurisdiction to grant letters of administration in the estate of Antoine Lalouette to Hall, which was done in the year 1861, although the only property of the decedent in the county consisted of real estate.

The record of the proceedings of the Probate Court, showing the appointment of Hall as administrator, and the decrees, on final distribution, against him, in favor of the present plaintiffs in this suit, as *heirs* of Antoine Lalouette, was properly admitted in evidence by the Circuit Court, to prove the fact of such administration, and the heirship of the plaintiff. This point was so expressly decided in the

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case of *Lalouette's Heirs v. Lipscomb* (improperly reported as *Lalouette's Heirs v. Lipscomb*), in 52 Ala. 570; the defendant there, as here, having entered the premises sued for as tenants, under a lease from the administrator, the court said: "The defendant rented from, and held under Hall, as the administrator of the estate, and was consequently a privy in estate with Hall as such administrator; and, being such privy, the recitals in the record of Hall's settlement as to the heirship of the plaintiffs, are evidence against the defendants, to the same extent that they would be, in a proper case, against Hall himself."

There are few principles of law better settled than that both tenants and their privies, in blood or estate, are estopped from disputing the title of the landlord under whom they hold, or of any one who succeeds to his rights, so long as they continue the possession originally derived from him. Hence, when sued for the possession of the demised premises by the landlord, or one surrendering to his rights, the tenant is precluded, as well after the termination of the lease as during its continuance, from calling the title of the plaintiff in question, or from setting up an outstanding title in a stranger, or third person.—*Russell v. Erwin's Adm'r*, 38 Ala. 44; *Shelton v. Eslava*, 6 Ala. 230; *Seaberry v. Stewart*, 22 Ala. 207; 4 Wait's Act. and Def. p. 258, § 2; Taylor's Land. and Ten. § 629.

The rule might, of course, be otherwise, upon well settled grounds of reason, public policy, and principle, where the tenant had been induced to accept a lease through fraud, mistake, or misrepresentation.—*Camp v. Camp*, 15 Amer. Dec. p. 60 and p. 69, note.

The defendants, in this case, after the first action of ejectment against them brought by Hall, in which he recovered the premises here sued for, submitted to Hall's claim as administrator of the estate of Lalouette, and paid him rent from the year 1867, to, and including, the year 1872. Hall was, of course, a mere trustee, representing the creditors of the estate, if any, and also the heirs. No debts being proved against the estate, his recovery enured to their benefit, between whom and himself there is manifest privity. *Bennett v. Covelman*, 48 Barb. (N. Y.) 73. It is, therefore, immaterial in this action whether the title of the plaintiffs is good or bad, or whether the lands sued for had escheated to the State of Alabama, or otherwise. These questions can not be raised by the defendants, so long as they continue to hold under their originally acquired possession, derived as tenants from Hall, the administrator.

It is objected, and further assigned for error, that the

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record shows a separate judgment entry against each of the several defendants in the court below. Conceding that this objection is taken in time, without being first urged in the lower court, the defect is a clerical error, or want of form merely, which can be corrected in the appellate court. Where there are more defendants than one, the statute authorizes the jury to "assess damages arising from the detention of the land [sued for] and injury thereto, *in severalty*, against each defendant for distinct damages."—Code 1876, § 2964. Whether this confers the authority to enter a separate judgment or not against each defendant, the better and more proper practice is to have but one judgment entry, with the assessment of damages only in severalty.

Let the judgment of the Circuit Court be, accordingly, corrected here, and a judgment entered, with a writ of possession, against all of the defendants, for the premises, with costs, and with an assessment of damages in severalty, according to the verdict of the jury.—Code 1876, §§ 3155, 3943, 3946; *Smith v. Kennedy*, 63 Ala. 334; *Jean v. Sandiford*, 39 Ala. 317; *Jackson v. Shipman*, 28 Ala. 488.

Affirmed.

STONE, J. (*dissenting*).—I dissent from that part of the foregoing opinion which holds that the record of the final settlement and distribution of the estate of Lalouette, made by Hall, the administrator, was legal evidence against Bishop and others, that the plaintiffs in this action are the heirs at law of Antoine Lalouette. I think the case of *Lalouette v. Lipscomb*, 52 Ala. 570, was erroneously decided, and that it should be overruled. I can not perceive on what principle Hall's admission, even of record, if you please, that certain persons were the legal heirs of a decedent, whose personal representative he was, should conclude, or in any way bind his tenants, who had previously taken possession under him, that the present plaintiffs were in fact the heirs of his intestate. The probate proceeding was *res inter alios acta*. Bishop and his co-defendants had acquired possession under Hall, as the administrator of Antoine Lalouette. This estopped them from disputing Lalouette's title. So, when the purposes of the administrator were accomplished, and the right of the administrator to withhold the possession of the realty from the heirs had thereby ceased (see *Calhoun v. Fletcher*, 63 Ala. 574), then the tenant was estopped from disputing the title of the heir, as, by the lease, he had estopped himself from disputing the title of the ancestor. The heir's title was the ancestor's title, and the estoppel applied as well after descent cast, as before. But this in no manner



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determined who the heir was. The record in this case raises the question, who were the heirs? The defendants were authorized to demand legal proof of that fact. I do not think the proof offered was legal evidence against them.

## McElderry v. Jones.

### *Statutory Real Action.*

1. *United States treasury notes legal tender.*—United States treasury notes are, equally with gold and silver, a legal tender at their nominal value for the payment of debts, whether such debts were contracted before, or after, the passage of the acts of Congress authorizing their issue, and declaring them a legal tender.

2. *Depreciated currency; promise by debtor to make good, deficiency caused by payment of, valid.*—A promise by a debtor, who pays depreciated currency to his creditor, to make good the deficiency, is founded on a valuable consideration, and may be enforced, although the creditor may have surrendered the evidence of the debt.

3. *Debtor; promise to pay more than due to creditor, not to be enforced.*—But a promise by a debtor, who tenders money to his creditor, such as the latter is bound to receive, and which is the full measure of the debtor's liability, to pay more in another currency, of greater value in the transaction of business, is without consideration, and can not be enforced.

### APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

This was a statutory real action, brought on the 9th of February, 1872, by Thomas McElderry against McMin Jones. On the trial, the plaintiff read in evidence three promissory notes, for one thousand dollars each, made by the defendant on January 24, 1859, and payable to the plaintiff, in one, two, and three years after date. The plaintiff also read in evidence, a mortgage on the lands sued for, which recites that it was executed to secure the payment of the notes. There were various credits on these notes, but none of them were controverted, except as follows: It appeared, from the evidence, that about June 12th, 1866, when United States treasury-notes were at a discount of from thirty-five to forty per cent, the defendant went to plaintiff's house, taking with him \$2,000 in United States treasury-notes. He asked the plaintiff if he was willing to take these notes at par value, and plaintiff declined to do so. Defendant then handed the package of notes to plaintiff, who counted it over, found that it contained \$2,000, and thereupon entered a credit of \$500 on each of the three promissory notes. Defendant did not assent to this, nor did he object to it. If the treasury-notes

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or "legal tender notes" were taken at their face value, very little, if anything, was due on the mortgage debt. The court charged the jury, "that if they believed, from the evidence, that on the 12th day of June, 1866, the defendant paid the plaintiff \$2,000 in legal tender notes, the defendant is in law entitled to a credit of \$2,000 on the notes read in evidence, as of the date of such payment, and that a credit of \$2,000 of that date should be allowed, in favor of the defendant, by the jury, in making up their verdict. The plaintiff excepted to this charge. The plaintiff then asked the court to give the following written charge: "If the jury believe, from the evidence, that on the 12th day of June, 1866, the defendant paid the plaintiff \$2,000 in United States notes, commonly called "legal tender notes," and, at the time of such payment, said notes were at a discount of from thirty-five to forty per cent. as compared with gold or silver coin, and at the time of the payment there was an express, or implied, agreement between the parties, that such notes were paid and received at twenty per cent. discount, then the defendant is only entitled to a credit of \$1,500 on account of such payment." This charge the court refused to give, and the plaintiff excepted. There was a verdict for the defendant. The errors assigned are the giving of the charge, and the refusal to charge as requested.

JOHN T. HEFLIN, for appellant.—The debt due to McElderry was payable only in coin, when it was created, and the parties may agree as to the rate at which treasury-notes shall be received and credited on it.—*Bush v. Baldry*, 11 Allen, 369; *Sears v. Dewing*, 14 Allen, 426; *Starwood v. Flagg*, 98 Mass. 125. The difference between the value of coin and legal tender notes is recognized in law.—*Ezell v. Parker*, 41 Miss. 528; *Holt et al. v. Given*, 43 Ala. 613. There was a moral obligation to pay the debt in coin, and, hence, after a voluntary payment by the debtor in depreciated currency, it can not be subsequently avoided.—*Jones v. Thomas*, 5 Cald. 645; 74 Pa. St. 371. The agreement of the parties to pay and receive legal tender notes at less than their nominal value is binding, and the change in the decisions of the Supreme Court of the United States can not affect such an agreement.—*Harris v. Jex et al.*, 55 N. Y. 421; 1 Wall 175; *Gilman v. Douglas*, 7 Nev. 28.

TAUL BRADFORD, for appellee.—When Jones paid McElderry the \$2,000 in United States treasury-notes they were legal tender for the payment of debts, their value was fixed, and was equal to the same amount of gold coin. This was

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settled by the decision of the Supreme Court of the United States in the "Legal Tender Cases," (17 Wallace), and whatever may be our opinion as to the manner in which this decision was reached, we must regard it now as a correct exposition of the law. An agreement by Jones to pay more than the original indebtedness, under the facts in this case, would have been "*nudum pactum*." The legal tender quality of the notes could not be changed by private agreement. But appellee insists that there was no evidence before the jury, showing, or tending to show, that Jones agreed that the \$2,000 should be taken by McElderry at \$1,500.

BRICKELL, C. J.—This was a statutory real action by a mortgagee to recover from the mortgagor possession of the mortgaged premises. The only defense insisted upon was the payment of the mortgage debt before the commencement of suit. Whether the defense was available, was not matter of controversy in the Circuit Court. The contention by the parties was limited to the fact of payment, and the instructions given and refused, all proceed upon the hypothesis, that if the fact of payment was proved, it was an available and complete defense. Whether the mortgagee can not recover in ejectment after payment of the mortgage debt, is a question which has not been heretofore decided, and which we now leave open, this cause, as it is presented, not involving it.—*Collins v. Robinson*, 33 Ala. 91.

United States treasury-notes are, equally with gold coin, a legal tender at their nominal value for the payment of debts, whether the debts were contracted prior or subsequent to the acts of Congress authorizing their issue and declaring them a legal tender.—*Legal Tender Cases*, 22 Wall. 459. Whoever may tender, or may receive the one or the other, tenders or receives all that can by law be demanded in payment—the one is the legal equivalent of the other. If the mortgagor had made a payment of two thousand dollars in United States treasury-notes, declared a legal tender by the acts of Congress, to that extent the mortgage debt was extinguished, the promise of the debtor was fulfilled, the obligation of his contract satisfied. This was the simple proposition embodied in the instruction given, to which an exception was reserved.

If a debtor makes a payment in depreciated currency, promising the creditor to make good the depreciation, the promise is founded on a valuable consideration, and will be enforced, though the creditor may have surrendered the evidence of debt.—*Mills v. Geron*, 22 Ala. 469. This is certainly true of bank notes, not a legal tender, not money in contemplation of law, but which by common consent, in the ordinary



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course and transaction of business, are treated and esteemed as money. It is the consent of those who employ them that gives them currency and value as money, and the consent may be yielded, or refused, at the election of all to whom they are tendered. If it is yielded upon a promise that they shall be made the equivalent of *money*—of that which, by law, is made the currency, and which may be tendered and must be received in payment of debts, there is a consideration for the promise. But there can be no consideration for the promise of a debtor who tenders *money* to his creditor, which the creditor is bound to receive, and which is the full measure of the debtor's liability to pay more, because there is another kind of money, no more in legal contemplation than the equivalent of that which is tendered, having a greater value in the transaction of business. If there was an agreement by the appellee that the treasury-notes should be accepted at their value as compared with gold coin, instead of their nominal value, it was without consideration, and did not lessen his right to a credit on the mortgage debt, for their nominal value. There was no error in the refusal of the instruction requested, and the judgment of the Circuit Court is affirmed.

## Bull v. The Mobile & Montgomery Railroad Company.

*Action by Employee against Railroad Company for damages for Personal Injury.*

1. *Employee of railroad company; when cannot recover against, for personal injury.*—A railroad company is not liable for damages, at the suit of one of its employees, for injuries received in a collision between two trains, when such collision was caused by gross negligence on the part of the officers in charge of one of the trains.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

On the night of March 13th, 1876, at about ten minutes after 12 o'clock an irregular train, running from Montgomery to Mobile, over the defendant's railroad, collided at Greenville with the regular train running north. The north bound train was standing on "the switch frog," just north of the station, and the south bound train came at a speed of about twelve miles an hour into the station. The engineer on the latter train

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was seated with his head lying on his arm, in which position he had remained while the engine had traveled about five miles. He testified, however, that he was not asleep. The station was at the top of an up grade, and all the evidence was to the effect, that if the engineer had "shut off steam," at the beginning of the up grade, he could have stopped his train without the aid of the brakes. There were three brakes on the train, one of which was out of order. Appellant was a fireman on the irregular train, and as soon as he saw the north bound train cried out, "there is an engine on the main line," and ran to pull the bell line, and to put on the "tender brake." In doing this, he was caught between the engine and tender, and seriously hurt, receiving a flesh wound in the thigh, and a contused wound in the foot. He was confined to his bed for a long time, and was put to great expense for medical and other attention. This action was brought to recover damages for the injuries thus sustained. On the trial, it appeared that both the engineer and the conductor on the irregular train were competent men to fill their respective places; that it was the duty of the "yard master" to make up the trains, and that the number of cars, and of brakes, was left to their judgment and skill; that one of these "yard masters" was discharged for intemperance, but it did not appear that he had made up the train on which appellant was injured. The court charged the jury, at the request of appellee, "that if they believed the evidence they must find for the defendant." The action of the court in giving this charge is assigned for error.

MCKINSTRY & SON, for appellant.—The damage to appellant was caused by the negligence of the defendant, appellee, in the insufficient equipment of its trains. The collision in which he was injured arose from the inability to check the speed of the train, because the brakes were insufficient, and therefore the appellee is liable.—4 Port. 224, 22 Ala. 294; 24 Ala. 21; 25 Ala. 659; 42 Ala. 672; 48 Ala. 459. There was evidence tending to show that the brakes were insufficient; that appellant's injury was caused by inability to check the speed of the train for that reason; that the officer, who had charge of making up the trains, was of intemperate habits. The charge of the court withdrew all this evidence from the consideration of the jury, thus invading its province.—30 Ala. 253; 36 Ala. 449; 33 Ala. 429; 39 Ala. 169.

GREGORY L. SMITH, for appellee.—The injury to appellant was caused by the negligence of the engineer, in running too fast. He was a fellow servant of appellant, and the latter

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cannot recover for an injury caused by his negligence.—*M. & M. R. R. v. Thomas*, 42 Ala. 700; *Walker v. Bolling*, 2 Ala. 309; *Smith v. M. & M. R. R.* 59 Ala. 245. The evidence only tended to show that the brakes were insufficient generally, but unless the insufficiency was the proximate cause of the injury, appellee is not liable.—*Lane v. Atlantic Works*, 111 Mass. 135; 11 Ohio St. 333; 35 N. Y. 210; 6 Jones N. C.; 46 Pa. St. 151. And it must be shown, that appellee failed to use due diligence in selecting a competent man to prepare the train, or failed to supply the necessary implements to construct the train properly. *M. & M. R. R. Co. v. Thomas*, (*supra*), and the burden of proof was on appellant. The making up of the train was left to the skill of the yard master, and if the company had selected a competent man to fill this place, they are not liable to appellant for an injury caused by his negligence. There was no conflict in the evidence and the general charge was properly given.—20 Ala. 691; 56 Ala. 549; 22 Wall. 116. When the evidence justifies the general charge, it should be given, for in this way only, can a corporation be protected.—31 Com. B. 918; 3 C. B. (N. S.) 166; 7 Am. Rep. 123.

STONE, J.—There can be no question that the injury of which plaintiff complains, was the result of gross carelessness. The testimony, although voluminous, is not in conflict, except on a few minor and immaterial points. It all points in one direction—namely, that the collision resulted from the gross carelessness and disobedience of orders, of which the officer or officers having charge of the running of the down train were guilty. Why the engineer, expecting to meet a regular train at Greenville, should approach that station at the speed the testimony discloses, and why the conductor, and even the fireman, did not take steps to counteract such recklessness, are questions which our want of knowledge of the government of trains does not enable us to answer. Charity suggests that the engineer was asleep, and the testimony of the witness Harris tends to confirm the suspicion. No want of skill is imputed to the engineer or conductor, while all the testimony tends to show they were competent. Plaintiff being an employee of the railroad company and fellow-servant of the officers through whose negligence the injury was done, the case falls directly within the principle declared in *Mobile & Montgomery Railway Company v. Smith*, 59 Ala. 245; and the charge of the court was, therefore, free from error.

Affirmed.



[Burns v. Henry.]

## Burns v. Henry.

*Trover before Justice of Peace; Plea, want of Jurisdiction.*

1. *Justice of peace; when has no jurisdiction in actions of trover.*—Justices of the peace have no jurisdiction, in actions of trover, when the amount of the damages claimed exceeds fifty dollars.

2. *Jurisdiction; when want of is apparent on the pleadings, how taken advantage of.*—When in an action of trover before a justice of the peace, the justice's want of jurisdiction is apparent on the complaint, and, in the judgment, the defendant is not put to his plea, but may take advantage of it, by a motion to dismiss the case.

3. *Same; when want of is not apparent on the face of proceedings, how advantage taken of.*—In such a case, if the justice's want of jurisdiction does not appear on the face of the complaint, the facts which show it must be set up by plea in abatement to the jurisdiction.

APPEAL from the Circuit Court of Etowah.

Tried before Hon. W. L. WHITLOCK.

The facts are stated in the opinion of the court.

J. L. CUNNINGHAM, and AIKEN & MARTIN, for appellant.

DENSON & DISQUE, for appellee.—The motion to dismiss, for want of jurisdiction in the justice's court, was properly overruled.—Const. Ala. Art. VI, § 26. Even if the amount claimed was beyond the jurisdiction of the justice, the defendant waived any objection on that ground, by failing to file a plea to the jurisdiction, and taking the case to the Circuit Court. Appeals from such courts are, in the Circuit Courts, tried *de novo*, without regard to defects in the summons, or other proceedings before the justice.—Code, § 3121; *Glaze v. Blake*, 56 Ala. 379.

SOMERVILLE, J.—This is an action of *trover*, claiming the sum of one hundred dollars damages for the conversion by the appellant, Burns, of four bales of cotton and one horse, the property of the appellee, Henry. It was originally commenced in November, 1876, before a justice of the peace, where a motion was made by the defendant to dismiss the case for want of jurisdiction, which was refused to be entertained by the justice, who, thereupon, proceeded to trial, and rendered judgment against the defendant for the sum of \$68.83, and costs of suit. On appeal to the Circuit Court, the motion to dismiss, for want of jurisdiction by the

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justice, was renewed and overruled, and the refusal of the court to grant the motion is assigned for error.

In *Carter v. Alford*, 64 Ala. 236, it was held, that under the provisions of Art. 6, § 26, of the present Constitution (of 1875), and of section 757 of the present Code (of 1876), a justice of the peace has no jurisdiction of actions brought for the recovery of specific property, where the value of such property sued for exceeds the sum of fifty dollars. The decision was put upon the ground that this section of the Constitution, conferring jurisdiction on justices where the amount in controversy does not exceed one hundred dollars, is not self-executing, but requires legislation to give it effect.

It is equally manifest, for like reasons, that the jurisdiction of justices, in actions of *trover* and other *torts*, is confined by the statute to cases "where the damages claimed do not exceed fifty dollars."—Code 1876, § 757, subdiv. 2; *Carter v. Alford*, *supra*.

The justice, before whom the case originated, very clearly, therefore, had no jurisdiction of the subject matter, because the damages claimed, and also the judgment rendered, exceeded the sum of fifty dollars.—*Crabtree v. Ollatt*, 22 Ala. 181; 2 Brick. Dig. p. 177, § 31.

This want of jurisdiction is apparent on the face of the proceedings, both in the complaint, and the amount of the judgment rendered. Where such is the case, we see no reason why a party defendant should be put to his plea denying the jurisdiction. An objection, interposed by motion to dismiss, is sufficient, especially in view of the want of formality and technical accuracy which is permitted to characterize proceedings in justice's courts. It is well settled that a motion to dismiss a suit, for want of jurisdiction of the *subject matter*, is never out of time. This can not be waived by consent, as want of jurisdiction over the person may be. It is admitted, however, that this principle would not apply so far as to *oust* the jurisdiction of the Circuit Court, after appeal from a justice's decision, if the defendant waives all objection on that ground; for the Circuit Court can hear and determine the case by virtue of its general jurisdiction over the amount claimed.—*Vaughan v. Robinson*, 20 Ala. 229. If it does not appear on the face of the complaint, the facts showing a want of it must then be set up by a plea in abatement, denying jurisdiction. These principles, we think, are amply sustained by the following authorities: *Stoughton v. Mott*, 13 Vt. 175; *Gormly v. McIntosh*, 22 Barb. (N. Y.) 271; *Wildman v. Reder*, 23 Conn. 172; *Thompson v. Morton*, 2 Ohio St. 26; 2 Brick. Dig. p. 177, § 32, and cases cited;

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*Crabtree v. Cliatt*, 26 Ala. 181. The case of *Glaze v. Blake*, 56 Ala. 379, is not inconsistent with these views.

The Circuit Court erred in overruling the motion to dismiss, which should have been granted. Proceeding to render the judgment here, which should have been rendered there, we hereby reverse the judgment of the Circuit Court, and dismiss the cause, taxing the appellee with the costs in this and the lower court.

STONE, J., *dissenting*.

## Collins v. Greene.

### *Action on Written Contract ; Plea, Set-off.*

1. *Administrator ; when may sue individually on contracts made with him in his representative character.*—If an administrator has accounted for the proceeds of contracts made with him in his representative character, or if he has been charged with them on his settlement, or if a claim grows out of his unauthorized disposition of the assets of the estate, by which he rendered himself liable therefor, and from which he has not been discharged, his right to sue individually, on such contracts, or claims, continues as long as he is administrator, and afterwards, and his personal representative may sue on them.

2. *Same ; when cannot sue individually on such contracts.*—If, however, the administrator has settled the estate, and has been discharged, without having been charged with such proceeds, then he can maintain no action on such contracts, or claims, and the right to sue passes to the succeeding administrator.

3. *Set-off ; when will be allowed.*—If the defendant could maintain a suit in his own name on the demand which is proposed as a set-off, and if he owned it before action brought, or (if the action be by an assignee), before notice of assignment, provided the cause of action is not commercial paper, such set-off will be allowed.

4. *"Sounding in damages merely ;" meaning of these words in the statutes regulating set-offs.*—Claims for which the law furnishes no standard of measurement, even when the facts are ascertained, "sound in damages merely," but those, the value of which may be measured by a pecuniary standard, when the facts on which they are based are established, do not "sound in damages merely," and may be the subject of a set-off.

5. *Set-off ; executor sued individually can not set-off debt due him as such.*—An executor, when sued individually, can not set-off against the plaintiff's demand, damages arising from the failure of the plaintiff to comply with his purchase of lands, which were sold by the register in chancery, on a bill filed by such executor to enforce the vendor's lien, held by the testator on the lands.

APPEAL from DeKalb Circuit Court.

Tried before Hon. LEWIS WYETH.

The material facts of the case are given in the opinion of the court, and it is only necessary to set out here a part of



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the pleadings, and the charges of the court. The defendant filed ten pleas. The substance of the 3d, 8th, 9th, and 10th pleas are given in the opinion. Plaintiff demurred to the 3d plea, because it set up a separate and distinct contract from the one sued on, and between different parties, and demurred to the eighth, ninth, and tenth pleas on these grounds, and also, because the demand set up as a set-off in them, was not mutual. The court sustained the demurrer to the third, ninth and tenth pleas, and overruled the demurrer to the eighth plea.

The court charged the jury, "that the written contract between Haralson and Collins, of date Dec. 16, 1873, and read in evidence before them, imposed no legal obligation upon said Haralson to pay to Collins, the amount of his bid for the lands bid off by him at register's sale, and interest thereon, or any portion of the principal or interest of the same." The defendant excepted to this charge. The defendant requested the court to give the following written charges, viz: 1. "That the contract between said Haralson and Collins of Dec. 16, 1873 (read in evidence), imposes on said Haralson, the obligation to pay to the defendant principal and interest of the sum bid by him for said land, by the first day of the next term of the Chancery Court for DeKalb county, after the 16th of Dec. 1873." 2. "That if the jury believe from the evidence that Haralson bid off the land at the register's sale, for four thousand dollars, in June, 1870, and failed to comply with the terms in paying the money, and that he agreed to pay the same in the written contract of Dec. 16, 1873 (read in evidence), and that he failed to pay the same, or any part thereof, and that said land was ordered to be re-sold, and was re-sold, in January, 1877, for the sum of four thousand dollars cash, and that said instrument of Dec. 16, 1873, was executed and delivered to the defendant before the transfer of the note sued on to plaintiff, then the defendant is entitled to set-off against the plaintiff's demand, the legal interest on Haralson's bid of four thousand dollars, for said land in Sept., 1870, up to the second sale of said land in June, 1877." The court refused to give either of these charges, and the defendant excepted. There was a verdict and judgment for the plaintiff. The action of the court in sustaining the demurrers to defendant's pleas, and in giving and refusing the charges, is assigned as error.

M. T. TURNLEY, and JAS. AIKEN, for appellant.

COOPER and REEVES, BRAGG & THORINGTON, and WATTS & SONS, for appellant.—The demurrer to the defendant's pleas  
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were properly sustained, for they set up matters of defense which do not belong to the defendant in the capacity in which he is sued, but in a different capacity, *i. e.*, as executor of the will of George.—*Tillinghast v. Johnson*, 5 Ala. 514. The defendant could not set-off, in this action, damages for the breach of the injunction bond, for the register in chancery is the person entitled to sue on such a bond. The court must construe all written contracts, and the construction given to the contract in this case was certainly correct.

STONE, J.—Collins, as the executor of George, on bill filed against one Walker, obtained a decree to sell lands, in payment of the purchase-money thereof, due to his testator's estate. The lands were sold by the register in 1870, and Haralson became the purchaser at the price of four thousand dollars. He failed to pay the purchase-money, and litigation grew up between him and Collins in regard to it. Collins was moving to have an order of resale; and Haralson, claiming that he had paid the purchase-money, filed a bill and obtained an injunction, enjoining a second sale. Haralson had also filed exceptions to the report of sale made by the register, as we infer from the record, and the exceptions had not been acted on. At this stage of the litigation, the parties came to an agreement of compromise at the December term, 1873, of the court, and entered into a written agreement, signed December 16th, 1873. Haralson agreed to withdraw all exception to the report of sale, and to allow it to be confirmed. He also agreed to "withdraw all opposition to the order of sale heretofore made and decreed being renewed, and to interpose no objection or opposition to said land being sold under said decree, at any time after the [then] next term of said court, upon condition that he [Haralson] failed to pay to the complainant, or to the register of the court, the amount bid by him, said Haralson"—(\$4,000)—with interest from the date of the purchase, and certain costs. The cause was continued under, and by the terms of this agreement. The agreement contained the further provision, that Haralson would, and did, at that term—December, 1873—dismiss his bill of injunction theretofore filed against the said Collins, as executor aforesaid, at his, Haralson's costs; and Haralson and his sureties were released from all liability for damages on the injunction bond. Pursuant to this agreement Haralson's bill was dismissed, and the report of sale confirmed; the latter order at December term, 1874. At that term, Haralson not having paid the purchase-money, an order for a re-sale was granted; and in 1877, the register made and reported a second sale to one

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Vance, for four thousand dollars cash. Six or seven years intervened between the first and second sales. The pleadings set forth, that in 1875 Haralson filed another bill against Collins, and obtained an injunction thereon, again restraining the sale of said lands under the renewed decree, on the same ground as before—that he had paid the purchase-money. In obtaining each of said injunctions, the pleadings aver he had given the customary bond to pay damages, if the injunction should be dissolved. The second injunction was dissolved, the bill dismissed, and on appeal to this court, the decree of the Chancellor was affirmed.—*Haralson v. George*, 56 Ala. 295.

The present suit, brought by Greene as the indorsee of Haralson, is founded on a written contract, as follows :

“Lebanon, Alabama, August 5th, 1873: \$1500.00. Received of W. J. Haralson fifteen hundred dollars upon lands, to be repaid with interest thereon, to said Haralson, or his order, at the termination of a certain injunction suit now pending in the Chancery Court of DeKalb county, Alabama, wherein said Haralson is plaintiff, and the undersigned, Alfred Collins, ex'r of the last will of C. D. George, dec'd, is defendant; and it is agreed by the parties that this transaction is not to be given or received as evidence for or against either party on the hearing of said injunction cause. (Signed) Alfred Collins.”

The present suit was brought February 28th, 1876.

The main questions in this cause arise on the Circuit Court's rulings on the demurrers to defendant's pleas of set-off. The 3d plea seeks to set-off in this action the damages sustained in the loss of interest between the first and second sales. The 8th plea counts on the damages Collins sustained in the alleged breach by Haralson, of the agreement of December 16th, 1873, the substance of which is given above, and offers to set-off such claim for damages against plaintiff's demand. Plea No. 9 relies on, and offers to set-off the damages defendant had sustained, in consequence of the injunction bond, given by Haralson in the first suit by him, to prevent a second sale of the property; and Plea No. 10 counts on the damages resulting from the bond given, and injunction obtained in the second suit by Haralson. The Circuit Court sustained plaintiff's demurrers to pleas numbered 3, 9, and 10, and overruled them as to plea 8. There are three aspects in which these pleas should be considered :

*First.* Could Collins sue and recover in his own name, as an individual, on the facts set up in them, or either of them?

*Second.* If he could, can he use the claim as a set-off



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against a suit which only authorizes a personal recovery against him?

*Third.* The question of mutuality out of the way, is the demand of such a character as to constitute a good set-off against a money demand?

*First.* An administrator may sue individually on a contract made with him in his representative capacity. This right continues as long as he remains administrator, and afterwards, and to his personal representative after him, if he has accounted for the proceeds, or is charged with them in his settlement, or, if the claim grew out of an unauthorized disposition by him of the assets of the estate, by which he rendered himself liable therefor, unless he has been discharged from such liability. If he has settled the administration, been discharged, and has not been charged with such sum, then he can maintain no action on the claim, and the right to sue passes to the succeeding administrator.—*Harbin v. Levi*, 6 Ala. 399; *Tate v. Shackelford*, 24 Ala. 510; *Arrington v. Hair*, 19 Ala. 243; *Watson v. Collins*, 37 Ala. 587; *Tompkins v. Reynolds*, 17 Ala. 109.

*Second.* On the question of ownership of a demand, which will authorize its use as a set-off or cross-action, if the defendant owned it before action brought, or (if the action be by an assignee), before notice of assignment, provided the cause of action is not commercial paper; and if the cross demand be such that the defendant could maintain a suit on it in his own name, then such set-off will be allowed.—*Brazier v. Fortune*, 10 Ala. 516; *Hall v. Chenault*, 13 Ala. 710; 2 Brick. Dig. 423, § 22.

*Third.* "Mutual debts, liquidated and unliquidated demands, not sounding in damages merely, subsisting between the parties at the time of suit brought, may be set-off one against the other."—Code of 1876, § 2991. What is meant by the phrase, "sounding in damages merely," is that class of claims for which the law furnishes no standard of measurement, even when the facts are ascertained. Actions of trespass, assault and battery, actions for slander, malicious prosecution, &c., are of this class. On the other hand, if the claim be one, which, when the facts upon which it is based are established, the law is capable of measuring its value by a pecuniary standard, then it is not a claim sounding in damages merely, and may be the subject of a set-off. *Sledge v. Swift*, 53 Ala. 110, and authorities cited; *Rosser v. Bunn*, at the present term.

There is a fourth question, not directly presented in this case, but which bears somewhat on the question we are considering. Independently of the agreement of compromise of

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December 16th, 1873, in whom was the right of action to recover of Haralson the damages sustained by his failure to comply with his purchase made in 1870? Under our rulings, the action could have been maintained either by the register of the court, or by the person to whom the money would belong when collected.—*Robinson v. Garth*, 6 Ala. 204; *Hutton v. Williams*, 35 Ala. 503. But this right, not being based on a contract made with, or promise to pay Collins, would not support an action brought in his own name as an individual. To recover, he must have sued as executor. These damages, based alone on Haralson's default as a purchaser, could not be the subject of a set-off in this action, for want of mutuality. The debt of Collins was an individual liability. His claim against Haralson would be as executor of George.

The principles we have stated above are fatal to the defenses set up in pleas 3, 9, and 10, and the demurrers to them were properly sustained. The sale was made by the register, and hence, Haralson's contract was made with him. Collins could not sue him for damages he had suffered from the failure to pay, except in the right in which he had sued and obtained his decree. That was as executor of George, to whose estate the money would belong when collected. So, of the defenses set up in pleas 9 and 10. Injunction bonds are payable to the register—Code of 1876, § 3871—and are in no sense contracts with the defendant in the suit. Collins could sue upon them only in the right injuriously affected by the injunctions. That was as executor of the decedent, whose lands were the subject of the suit. Plea number 8 sets forth a breach by Haralson of the agreement of compromise of December 16th, 1873, and avers damages as the result of such breach. This being under a contract made directly with Collins, presents matter of a legal set-off, to the extent Collins sustained damages caused by such breach. The rule for damages in such cases is laid down in *Bolling v. Tate*, at the present term. But the demurrer to this plea was overruled, and the record presents no rulings or charges based upon it, to which exceptions are reserved.

As to the charges of the court, to which exceptions were reserved; we agree with the Circuit Court in the construction of the agreement of December 16, 1873. While it bound Haralson to do certain things, and not to do others, it imposed no legal obligation on him to pay Collins the amount of his bid for the lands bid off by him at the register's sale, or any portion of the principal or interest thereof. That obligation was left, as the fact of his purchase had created it, not strengthened or varied in the least, by the agreement entered into. Certain rights were secured to Haral-

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son under the agreement, and certain privileges, if he paid the principal and interest of his bid, and certain costs, by the, then, next term of the Chancery Court. He gave no additional promise to pay. The first charge asked by defendant, asserts the converse of the above proposition. The second charge asked, asserts the proposition, that the defense attempted under plea number 3, is a good defense to this action. We have shown above that neither of these charges should have been given. We deem it unnecessary to notice the various other rulings of the Circuit Court, to which exceptions were reserved. They are free from error.

Affirmed.

## Clark & Murrell v. The Port of Mobile.

### *Action for Penalty for Violation of Municipal Ordinance.*

1. *Taxation ; statute fixing basis of on statute of another State, unconstitutional.* The statute which provides, that if any other State requires of an insurance company created, or organized by the laws of Alabama, any deposit of security or payment of taxes, fines, penalties, certificates of authority, or license fees, greater than the amount required for a similar purpose from similar companies of other States by the then existing laws of Alabama, then all the companies of such States establishing, or having heretofore established agencies in this State, are required to make the same deposit, for a like purpose, with the Treasurer of this State, and pay to the State Treasury for taxes, fines, penalties, and license fees, an amount equal to the amount of such charges and payments, imposed by the law of such State upon the companies of this State, and the agents thereof, is violative of the constitutional provision, which requires uniformity of taxation, upon the property of individuals and corporations (Art. XI § 6), and is an unwarranted delegation of the legislative power of this State to other States.

1. *Payment of license under, no protection.*—Hence the payment by a Mississippi insurance company doing business here of \$1,000 for a State license, which, by the law of Mississippi, is declared to be in full of taxes and licenses, State, county, and municipal, being unauthorized, does not relieve it from the payment of a municipal tax or license.

APPEAL from the City Court of Mobile.

Tried before HON. O. J. SEMMES.

The facts are sufficiently stated in the opinion.

OVERALL & BESTOR, for appellant.

BRAXTON BRAGG, for appellee.



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SOMERVILLE, J.—This is a suit for a penalty of ten dollars, imposed on appellants by the Recorder's Court of the Port of Mobile, for alleged violation of a municipal ordinance of that city, requiring a license for the exercise of the privilege of carrying on the insurance business. The appellants were agents of the Columbus Fire Insurance Company, an insurance corporation chartered under the laws of the State of Mississippi. The laws of that State require foreign insurance companies to pay a license tax of \$1,000 to the State, to be received in lieu of all other taxes or licenses, which are prohibited to be exacted by any county, or municipal authority.—Code of Miss. (1880) §§ 585, 587.

Section 1432 of the Code of Alabama (1876) requires all insurance companies, not incorporated under the laws of Alabama, to pay a license of \$100, for the privilege of transacting any business of insurance in this State.

But it is further provided by section 1440, as follows : “ Whenever *the existing or future laws of any State of the United States* shall require of insurance companies, incorporated by or organized under the laws of this State, or of the agents thereof, any deposit of securities in such State for the protection of policy holders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for similar purposes from similar companies of other States, by the then existing laws of this State, then, in every such case, all companies of such States, establishing or having heretofore established any agency or agencies in this State, *are required to make the same deposit* for a like purpose with the treasurer of this State, for taxes, fines, penalties, license fees, or otherwise, *an amount equal to the amount of such charges and payment imposed by the laws of such State* upon the companies of this State, and the agents thereof.”

The appellants, in accordance with the requirements of this section, paid the sum of \$1,000 to the State Treasurer and obtained a license to carry on the insurance business in the State for one year from May 13, 1880. They claim that, under the terms of the above statute, they are relieved from paying any license to the municipal authorities of Mobile.

We do not think appellants can derive any protection from this statute, as, in our opinion, it is clearly incompatible with several provisions of the constitution of the State, which the courts are compelled to regard as “ the paramount law and the highest evidence of the will of the people.”—Potter's Dwarris on Stat. and Const. 66-67. It is, in the first place, violative of those clauses having reference to that uniformity of taxation required in assessing the property of private cor-

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porations and individuals. Section 6 of Art. XI reads as follows: "The property of private corporations, associations and individuals of this State, shall forever be taxed at the same rate; *Provided*, This section shall not apply to institutions or enterprises devoted exclusively to religious, educational or charitable purposes."—Const. (1875) Code, p. 145

Section 1 provides that "all taxes levied on property in this State, shall be assessed in exact proportion to the value of such property; *Provided, however*, The General Assembly may levy a poll tax not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund, in the county so paying the same."—*Ibid*.

Provisions, almost identical in phraseology with these, were found in the Constitution of 1866, and have been construed by this court in the case of *The Mayor of Mobile v. Stonewall Ins. Co.* 53 Ala. 570. It was there held that the purpose of the Constitution was to prevent invidious exemptions or discriminations by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden of taxation, demanded by that equality of right which is a fundamental principle of our institutions. BRICKELL, C. J., speaking for the whole court, says: "Reading these constitutional provisions in the light of their history, and with a due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the General Assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the Constitution inhibits the exemption or discrimination in form of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burthen, which is natural, right and equity, is secured alike to the corporation and to the citizens." See *Mayor, &c. v. Dargan*, 45 Ala. 318; *City of Davenport v. R. R. Co.* 38 Iowa, 633.

If the legislature possesses the power to pass a law of this character, there is nothing to prevent them from requiring a mere nominal license from any insurance company, or other private corporation, and on receipt of this sum to exonerate such corporation from taxation on millions of property. Such discrimination would manifestly *not* be taxing the property of all private corporations and that of individuals at the same rate, as required by § 6; nor would it be assessing all taxes levied on property in Alabama "in exact pro-

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portion to the value of such property," as exacted by § 1 of Art. XI of the Constitution.

We do not mean to intimate, by these views, that the legislature has no constitutional power to select, in its discretion, the subjects of State and municipal taxation. "The constitutional requirement of equality and uniformity only extends to such objects of taxation as the legislature shall determine to be properly subject to the burden. The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department; but over all those objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment." Cooley's Const. Lim. 515.

The section of the Code under consideration (§ 1440) is void, furthermore, for another reason. It is in effect, a delegation of legislative power. The framers of the Constitution have vested the law making power of this State exclusive in the General Assembly.—Const. (1875) Art. IV, § 1. No principle is better, and perhaps more wisely settled, as a maxim of Constitutional law, than that "the power conferred upon the legislature to make laws cannot be delegated to any other body, or authority."—Cooley's Const. Lim. 116–117. The people have reposed the power there, and it cannot be transferred to any other person, State, or nationality. This section of the Code authorizes, in effect, the legislature of Mississippi, speaking through its statutes, which are the subjects of extrinsic proof and not of judicial knowledge in our courts, to fix by law the amount which the Treasurer of Alabama shall demand of appellants as a license tax to do an insurance business in this State. If the law making power of that State should, in a day, modify, amend or repeal their revenue laws, *ipso facto*, such legislative action would modify, amend or repeal the legal operation of our laws, provided the principle contended for by appellant's counsel is a sound and prevailing one. This cannot be, for it would be confiding to a foreign jurisdiction that legislative discretion which the General Assembly of Alabama are constitutionally bound to exercise themselves, and which they cannot delegate or commit to another. They are not permitted to "substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."—Cooley's Const. Lim. 117; *Thorne v. Cramer*, 15 Barb. 112; *State v. Ware*, 33 Iowa, 134, (S. C. 11 Amer. Rep. 113); *Barto v. Himrod*, 8 N. Y. 483. If a law should be passed entitled "an act to authorize the legislature of Mississippi to fix the amount of the license tax to be required of insurance companies, organized under the laws



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of that State and doing business in Alabama," the objection would be obvious on first impression. Yet this is the necessary and practical effect of the statute as it now stands, subject to the sole limitation that the license could not be less than the sum of one hundred dollars, as required of foreign insurance companies generally by § 1432 of the Code.

This statute, under which the license of appellants was issued, being void for the reasons mentioned, it furnishes no exoneration from liability to pay such additional license as any municipal authority may be authorized by law to require of all insurance agents or companies. The City Court did not err in sustaining the action of the Recorder, and the judgment is affirmed.

## Potts v. Coleman.

### *Statutory Real Action.*

1. *Adverse possession; when vendee of lands does not hold.*—The possession of the vendee of lands, who holds under an executory contract of sale, is not adverse to his vendor, until the purchase-money is paid, or until, by the terms of the contract, he is entitled to demand a conveyance of the legal title.

2. *Estoppel; vendee of lands holding under executory contract estopped from denying vendor's title.*—The vendee of lands, who holds possession under an executory contract of sale, and all who derive possession from him, are estopped from denying the title of the vendor.

3. *Statute of limitations; when operative in favor of vendee of lands under executory contract of sale.*—After payment of the purchase-money of lands, the possession of a vendee, holding under an executory contract of sale, is antagonistic to his vendor, and if held continuously for the prescribed statutory period, without any recognition of, or any subordination to, the legal title of the vendor, his right of entry or of action is barred.

4. *Same; when not operative in favor of vendee under executory contract.*—Until the expiration of the period prescribed by the statute of limitations, a vendee in possession of lands under an executory contract of sale, and those who claim under him, have only an equity, which will not bar an action of ejectment, or the statutory real action.

5. *Purchase-money; when evidence of payment is admissible in ejectment by vendor against his vendee.*—In ejectment by the vendor, or his heirs, against his vendee, or those claiming under him, who hold possession under an executory contract of sale, evidence of the payment of the purchase-money is irrelevant, unless the vendee, or those claiming under him, have been in continuous possession of the lands for the period prescribed by the statute of limitations, (ten years), as a bar to the action, after such payment.

6. *Possession of lands; evidence of title prevails over subsequent possession.* The quiet, peaceable possession of lands, for a definite period, under claim of title, and accompanied by acts of ownership, is *prima facie* evidence of a legal title, and must prevail, at law, over a subsequent possession, not shown to be, under a superior legal title.

7. *Same: character of, when acquired as an advancement by parol.*—When a father puts his son in possession of land, intending it as a gift or advancement,

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the intention resting only in parol, a mere tenancy at will is created; and such possession can not become adverse, except by a dissolution of the tenancy, and an open, clear, positive, continuous disavowal of the title of the father, and the assertion of a hostile title which is brought to his knowledge.

8. *Adverse possession; court pronounces on facts constituting.*—The onus is on one who seeks protection as an adverse possessor, to show a hostile possession, but the court pronounces, as matter of law, the facts which enter into, and constitute such a possession.

9. *Same; what characterizes claim of title constituting.*—The claim of title, which is an indispensable element of adverse possession, has in it nothing of stealthiness, nor is it elastic, or flexible; there must be publicity, continuity, and good faith in its assertion, leaving no room for doubt by the person against whom it is asserted, that his title is disputed, and a hostile title asserted.

10. *Promissory note; possession of bymaker evidence of payment.*—The possession of a promissory note by the maker, or one who succeeds to his rights, or estate, tends to show that it has been paid, or that such person has acquired the beneficial ownership of it, but the presumption may be repelled by evidence that the possession was acquired without payment, and evidence that another note of the same tenor was substituted for it, is admissible.

### APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

This was a statutory real action, brought by Summer A. Potts, I. Hudson, F. G. Hudson, and W. E. Hudson, against B. W. and T. H. Coleman, and F. A. Butt. The suit was commenced on May 1st, 1872. On the trial it appeared, that in 1845 Isaac Hudson was in possession of the land in controversy, exercising acts of ownership and control over it, clearing and cultivating it, and building and occupying houses on it. Edward M. Hudson, who was the only child of Isaac Hudson, went into the possession of the lands in controversy in 1849, and cultivated them until 1852, when he moved to another place, which his father had purchased for him, because he preferred it to the lands sued for, and he then sold the latter tract to J. M. Roberts. He sold the lands on credit, taking notes for the payment of the purchase-money, and giving a bond to make titles to the land on its payment. Two or three years afterward Roberts sold the land to Jos. H. Bradford and B. A. Smoot, who assumed the payment of the purchase-money due on the lands. Smoot occupied the land for two or three years, and then released his interest in them to Bradford, who sold to H. W. Coleman and F. A. Butt. H. W. Coleman died before the commencement of this suit, leaving two heirs, B. W. and T. H. Coleman, who claim his interest in the said lands, in this suit. W. H. Coleman and F. A. Butt were in possession of the lands at the death of the former. Isaac Hudson died intestate on March 13, 1865, and E. M. Hudson died intestate on Oct. 23, 1861, leaving the plaintiffs his heirs. The defendants proved the execution of an instrument purporting to be a power of attorney made by Isaac Hudson to Marcus W. Duncan, au-

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thorizing him to convey the title to the lands to H. W. Coleman, and F. A. Butt, on payment by them to Duncan, of a note for \$5,000, made by J. M. Roberts on Oct. 25, 1852, payable to E. M. Hudson. This power recites that Duncan is appointed attorney for Isaac Hudson, and empowers him to make a deed to H. W. Coleman, and F. A. Butt in my (Isaac Hudson's) name, conveying the lands in controversy, and continues as follows: "They being the lands sold by E. M. Hudson to said Roberts in 1852. By this power of attorney, it is intended to confer upon the said attorney Duncan, as ample power to execute warranty title in fee simple to the above lands, as I myself have. The said title to be made whenever the said parties pay the said Duncan a certain promissory note for \$5,000, made by J. M. Roberts on October 25th, 1852, payable to E. M. Hudson on January 1, 1863, with interest from January 1, 1860; the interest on said note having been paid up to the last named date. The defendants then read this power of attorney in evidence to the jury. They then proved the execution of the following receipt: "27th December, 1859. Received of H. W. Coleman and F. A. Butt, four hundred dollars, in payment of the interest for 1859, on J. M. Roberts' note, made to E. M. Hudson for \$5,000. Isaac Hudson." The plaintiffs objected to the reading of the power of attorney in evidence, but the court overruled the objection, and plaintiffs excepted. The defendants then proved the genuineness of the signature of J. M. Roberts to the following note: "On the first day of January, 1863, I promise to pay Edward M. Hudson, or order, five thousand dollars, with interest from January 1st, 1854, for value received, 25th October, 1852; the interest to be paid annually. J. M. Roberts." The defendants then offered evidence showing that this note was found among the papers of H. W. Coleman, after his death, and offered to read the note in evidence. The plaintiffs objected to this note as evidence in the case, but the court overruled the objection, and plaintiffs excepted. Plaintiffs then proved that the following writing, or sealed note, was in the hand-writing of Marcus W. Duncan, who was the person named in the power of attorney, mentioned above; that said Duncan died in 1863; and that said note was found among the papers of Isaac Hudson, after his death. Said note is in the following words: "\$5,000. We obligate ourselves to pay to Isaac Hudson the sum of five thousand dollars by the first day of January, 1863, with interest from the first day of January, 1859, the interest to be paid January 1, 1860, and 1st January, 1861, and 1st January, 1862, and 1st January, 1863: As witness our hands and seals, this 1st November, 1859. H. W.



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Coleman, F. Alston Butt." The defendants objected to the reading of this note as evidence, and the court having sustained the objection, plaintiffs excepted. The court charged the jury, *ex mero motu*, "that if they believed from the evidence that H. W. Coleman and F. A. Butt, or either of them, had paid the note given by J. M. Roberts to E. M. Hudson for \$5,000, and that said note was given for the purchase-money of the lands in controversy, and was the last payment, and all that was due on said land, then the jury should find for the defendants. The plaintiffs excepted to the action of the court in giving this charge. There was a verdict for the defendants. The rulings of the court on the evidence, and the giving of the charges, are assigned as error.

JOHN T. HEFLIN, for appellant.—The law presumes that Isaac Hudson, who was in possession of the land, owned it, and no conveyance appearing from him to E. M. Hudson, it is presumed that the latter holds in subordination to the title of Isaac Hudson.—*Badger v. Lyon*, 7 Ala. 561; *McCall v. Pryor*, 17 Ala. 533; *Smith v. Lorillard*, 10 John. 339; *Jackson v. Sharp*, 9 John. 163; *Wickham v. Conklin*, 8 John. 223; *Jackson v. Thomas*, 16 John. 292; *Cox v. Davis*, 17 Ala. 714; *Russell v. Erwin's Adm'r*, 33 Ala. 44; *Anderson v. McLearn*, 56 Ala. 625. Even if the land was an advancement by Isaac Hudson to his son, E. M. Hudson, the title did not pass. 12 Ala. 124; 19 Ala. 398; 23 Ala. 649. The evidence shows that the sale by Edward Hudson to Roberts was treated by E. M. Hudson and Isaac Hudson as a sale of the property of the latter. Under the view of the case, which was taken by the Circuit Judge, the note for \$5,000 should have gone to the jury to enable them to decide whether the purchase-money had been paid, but the receipt for \$400 from Coleman and Butt, was not evidence, because Roberts had only a bond for title, and the payment of the purchase-money could not vest him with such a title as would enable him to defend against this action.—*Nickels v. Harkins*, 15 Ala. 619; 17 Ala. 749; 22 Ala. 207. The power of attorney to Duncan, which was introduced by the defendants, shows that the purchase-money of the land was not paid on the 30th of December, 1859. Hence, deducting the time elapsing from January 11, 1861, to September 25, 1865, (during which the statute of limitations did not run), the suit was not barred by the statute of limitations. But the possession of the defendants was not adverse, being acquired under a bond for title. 22 Ala. 207; 36 Ala. 308. Payment of the purchase-money is no defense to an action of ejectment, and the charge of the court asserting this proposition is erroneous.—*Moody v.*

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*Farr's Lessee*, 33 Miss. 192; 15 Ala. 619; *Ib.* 412; 33 Ala. 91; 13 Ala. 50; *Kelly v. Hendricks*, 57 Ala. 183. The legal title to the land is in the plaintiffs by descent.—19 Ala. 188.

TAUL BRADFORD, for appellees.—By the sale of the land to Roberts, E. M. Hudson repudiated the title thereto, as far as concerns the appellees, and an adverse possession began at the date of that sale in 1852. Neither Roberts, nor any one holding under him, subsequently recognized the title of Isaac Hudson. Thus, the statute of limitations had effected a bar when Isaac Hudson died, and hence, plaintiffs, who could only maintain this suit as his heirs, can not recover. The rulings of the court on the question of payment did the appellants no injury. If this action had been commenced after E. M. Hudson died, and before Isaac Hudson's death, then the heirs of E. M. Hudson could not have recovered if the purchase-money had been paid.—*Oliver v. Adams*, 50 Ala. The statute of limitations had barred the action as to Isaac Hudson's heirs, and the payment of the purchase-money to E. M. Hudson, who sold the land and who held nothing but possession, prevented a recovery by his heirs. Appellees insist, that under the statutes of Alabama, the vendor of land has no legal right to the possession of such land, as against his vendee, who has paid for them.

BRICKELL, C. J.—1. The possession of lands under an executory contract of purchase, is not adverse to the vendor, so long as the purchase-money is unpaid, or until by the terms of the agreement, the vendee is entitled to demand of the vendor a conveyance of the legal estate.—*Seabury v. Stewart*, 22 Ala. 207; *McQueen v. Ivey*, 56 Ala. 308; *Ormond v. Martin*, 37 Ala. 598. The vendee, though not strictly a tenant of the vendor, and though the technical relation of landlord and tenant is not created, is estopped from denying the title of the vendor, upon principle and reasoning like that which estops the tenant from disputing the title of the landlord; and the estoppel applies to whoever may acquire possession from the vendee.—*Jackson v. Harden*, 4 Johns. 202; *Jackson v. Barb*, *ib.* 220; *Jackson v. Walker*, 7 Cowen, 643; *Jackson v. Spear*, 7 Wend. 403; *Russell v. Erwin*, 38 Ala. 44.

We do not, therefore, apprehend that it is at all material in this case, to inquire whether the immediate ancestor of the appellants had the legal title in the premises in controversy, or whether the title resided in his father, Isaac Hudson. The sale by Edward M., to Roberts, from whom the appellees derived possession mediately, was executory. No conveyance

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of the legal title was to be executed until the final payment of the purchase-money in 1863; and until then, possession, whether continuous in Roberts, or transferred to others, was not adverse; and of the title of the vendor there could be no dispute. There could be no pretense of payment in full of the purchase-money, at any earlier period than some time subsequent to the payment of the annual interest on Roberts' note, on December 27, 1859. Deducting the period of the war, during which the operation of the statute of limitations was suspended, ten years had not elapsed from any time, at which payment of the purchase-money could be claimed, when this suit was commenced. *After payment* the parties in possession could not have more than a perfect equity. Having that equity, it is presumed the possession is antagonistic to the vendor, because all duty to him has been performed, and if the possession is continuous for the statutory period, without some recognition of or subordination to the legal estate of the vendor, his right of entry, or of action, is barred. But until the expiration of the statutory period, the vendee, or those claiming under him, have but an equity, which can not be interposed to bar an action of ejectment, or the statutory real action. In either action, that of ejectment, or the statutory real action, while the plaintiff must recover only on the strength of a legal title, when he shows such a title the defendants can not dispute, asserted within the period prescribed by the statute of limitations, he is entitled to recover, whatever may be the equities of the parties, unless the jurisdiction of courts of law and of equity, are blended and confused, and transferred from the one or the other, at the mere caprice of parties, or to meet the varying exigencies of particular cases. The radical error pervading all the rulings of the Circuit Court, is that it permitted to be drawn in question the payment of Roberts' note for the purchase-money, which was wholly impertinent, immaterial, and without its jurisdiction. The fact could only have been material, if there had been subsequent to the payment, a continuous possession, under claim of title, for a period of ten years, during which the statute of limitations was operative. 1 Brick. Dig. 627, §§ 33-40. The error led to the admission of evidence of the payment of interest on Robert's note for 1859, and to proof of the fact that his note was found in possession of Coleman, neither of which facts, was proper evidence in this cause.

2. The quiet, peaceable possession of lands, for a distinct, marked period of time, attended by a claim of title and by acts of ownership, is *prima facie* evidence that the legal estate is in the possessor, and the possession will prevail over a



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subsequent possession not shown to be under a superior legal title. The prior, will prevail over a subsequent possession, however hostile, not continued for the period prescribed by the statute of limitations to bar an entry, or an action to recover possession, because in itself, and of itself, it is evidence of prior right and title, which must remain good, until there is other evidence than mere possession of a superior title. The peaceable, continuous possession of Isaac Hudson, of the premises in controversy, from 1845 to 1849, under claim of title, accompanied by acts of ownership, clearing, improving, and cultivating them, is more consistent with the presumption that he had the full legal estate, than that he was a mere trespasser, or was holding in subordination to the title of another. The presumption strengthens, and for all the purposes of this case, becomes conclusive, in the absence of evidence of a superior title, when it is shown that the possession terminated only when he voluntarily transferred it to his son, and there has been since no other possession hostile to it.

The possession of the son was merely permissive, and was not hostile, but friendly and in strict subordination to the title of the father. The original intention may have been a gift, or an advancement of the lands to the son, and if that be true, the intention resting only in parol, a mere tenancy at will was created. Such a tenancy has in it no element of hostility to the title of the true owner, which is an indispensable ingredient of an adverse possession. Possession taken under it, could only be rendered adverse by a dissolution of the tenancy—by an open, clear, positive, continuous disclaimer, and disavowal of the title of the party from whom it is derived, and the assertion of a hostile title brought to his knowledge.—*Collins v. Johnson*, 57 Ala. 304. Adverse possession rests in the intention of the possessor—as is sometimes said, “the intention guides the entry, and fixes its character.”—*Herbert v. Hanrick*, 16 Ala. 595. It is manifest from the evidence, that the son never intended the assertion of a title hostile to that of the father; nor is there any room for the imputation of such an intention to any subsequent possessor of the premises. The sale to Roberts was doubtless with the consent of the father, and to meet the wishes and convenience of the son. Coleman and Butt, the last and present possessors of the premises, recognized distinctly the title of the father, and that their possession was subordinate to it, and that it was his title, they contemplated acquiring, when to his agent, they made payment of the interest for 1859, on Roberts’ note to the son. A more distinct recognition, was the substitution of their own note for that of

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Roberts, which was shown, when they produced Roberts' note, and the appellants offered their note, the body of which was written by the agent of the father, payable to the father, for the exact sum of the purchase-money, payable at the same time Roberts' note was payable, and stipulating to pay the interest annually, as the interest had been paid on Roberts' note. The power of attorney from the father, it seems, found its way into the possession of Coleman and Butt, the last and present possessors, and one of its stipulations is, that the agent and attorney shall convey the premises in the name and on behalf of the father, when Roberts' note to the son for the purchase-money was paid; and it recites the fact that interest on that note had been paid to January 1st, 1860, corresponding with the receipt for the interest for 1859, given by the agent and attorney, Duncan, which the appellees produced. While on the party claiming protection as an adverse possessor, lies the burden of proving a hostile possession, the court as matter of law pronounces the facts which must enter into and characterize such a possession. In the presence of the distinct recognition of the title of Isaac Hudson, shown in evidence, the court ought not to have hesitated to pronounce the appellees were holding in subordination to it. Nor ought there to have been hesitation in pronouncing that the appellees were estopped from denying the title of the son—they were his vendees, entering into possession under him, and proposing to acquire title, by converting themselves into trespassers, enabling themselves, as it has been not too strongly said, "to steal the title of another, by professing to hold under it."—*Kirk v. Smith*, 9 Wheat. 288. The claim of title which must enter into and is the characteristic of an adverse possession, has in it no element of stealthiness, nor is it elastic or flexible. There must be publicity, continuity, and good faith in its assertion, leaving to the party in whom the title may reside, or from whom the possession was derived, no room for doubt, that all friendly relations are dissolved, that his title is not recognized, but disputed, and a hostile title asserted. The appellants are the heirs of Edward M., and of Isaac Hudson respectively, and it is unimportant whether a right of recovery is asserted by them in the one, or the other capacity. If they claim as heirs of Edward M., the appellees standing in the relation of his vendees, or entering and claiming under his vendee, could not dispute his title. Or, if as heirs of Isaac, there is sufficient evidence that the legal estate resided in him, and that the appellees and those under whom they claim have been holding in recognition, and in subordination to his title.

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3. We have said that it was erroneous, in this action, to enter on any inquiry whether the purchase-money of the lands had been paid. If the inquiry had been material, Coleman's possession of Roberts' note, it may be, would have been a circumstance tending to show its payment, or that he had acquired the beneficial ownership of it. It was, however, only a circumstance from which such a presumption could have been raised, open to explanation, and subject to be repelled by evidence that without payment the possession had been acquired.—1 Green. Ev. § 38; 2 Whart. Ev. § 1362. The note made by Coleman and Butt, the body of which was in the handwriting of Duncan, the agent and attorney in fact of Isaac Hudson, empowered to make titles to the lands, on the payment of Roberts' note, and to whom Coleman and Butt had paid the interest for 1859, on that note, was admissible for the purpose of negating the presumption arising from Coleman's possession of the latter note. It was for the same amount, payable at the same time as Roberts' note, with the interest payable annually, as the interest on that note had been paid. The reasonable inference was that it had been substituted for Roberts' note, which Coleman and Butt must have paid, or caused to be paid, before they could obtain title. Its consideration, like the consideration of Roberts' note, was the purchase-money of the lands. The debt was the same, though the debtors were changed, and Coleman and Butt stood in Roberts' place, vendees in possession under an executory contract of purchase.—*Conner v. Banks*, 18 Ala. 42.

In all of its rulings the Circuit Court was in error, and the judgment must be reversed and the cause remanded.

## King v. Reynolds.

### *Action for Breach of Implied Covenant in Lease.*

1. *Lessee; lessor covenants to give possession to, unless stipulation to the contrary in lease.*—When there is no stipulation to the contrary in the lease, the lessor impliedly covenants, that the demised premises shall be open to entry, by the lessee, at the time fixed by the contract for him to take possession.

2. *Same; when no implied covenant to give possession to.*—But, if, after the time when the lessee is entitled to possession, under the lease, whether he has actual possession or not, a stranger trespasses on, or takes possession of, and holds the lands, this is a wrong to the lessee, for which the lessor is not responsible.

3. *Possession; when question for the jury, whether it is open to lessee.*—When, in an action by a lessee against his lessor, for a breach of the implied covenant



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to deliver possession, the evidence is conflicting, as to whether a trespasser was in possession of the lands, at the time fixed in the lease for taking possession, it is error to refuse a charge which submits this question to the jury.

APPEAL from Shelby Circuit Court.

Tried before Hon. JOHN HENDERSON.

This was a suit brought by H. C. Reynolds against F. R. King to recover damages for the breach of a contract of letting. The facts are stated in the opinion of the court. There was a verdict for the defendant. The refusal of the court below to give the charge, which is set out in the opinion, is assigned as error.

W. M. BROOKS, and M. T. PORTER, for appellant.—The charge requested by appellant should have been given, for King had no remedy against the acts of any trespasser who entered on the lands after the lease was made to Reynolds. Even if another person than the lessor, or lessee, was in possession of the lands at the time the lease was made, the contract of letting would not thereby have been broken.—*Taylor's Land. and Ten.* § 312; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Abrams v. Watson*, 59 Ala. 529. There is no implied covenant in leases that the tenant shall be protected against damages caused by the wrongful acts of strangers who have no right or title to the demised premises.—*Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep's, 708.

BRADFORD & BISHOP, and WILSON & WILSON, for appellees. The charge was properly refused, for it assumed that King delivered, or transferred the possession of the land as a matter of fact, when this was a question for the jury. There must be a delivery of the actual possession of demised premises, for the statute which dispenses with livery of seizin, (Code, § 2195), does not apply to leases of land. Reynolds did not acquire possession of the land, and could not maintain any action against a trespasser.

STONE, J.—McMath, as the agent of King, on the 8th day of May, 1878, made a contract with Reynolds, by which he let to him for the residue of that year, a piece of grass or meadow land, on agreed terms of rent, with which Reynolds complied. It is not denied that McMath had authority from King to make the lease. Reynolds did not obtain possession of the premises, and the present suit is brought to recover of King, damages for failing to deliver possession to Reynolds, the tenant. The complaint alleges that by the terms of the lease, King bound himself to put the tenant in possession. It was not shown that the contract of letting was in writing,

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and the averment stated above was not proved, as matter of fact. When Reynolds sought to obtain possession under his lease, Shortridge, a third party, disputed his right to take possession, claimed that he himself was the agent of King, and in possession, and, by threats, kept Reynolds out of possession, and occupied himself. To this extent there is no conflict in the testimony. There was conflict on two questions, first: Whether, at the time McMath gave the lease to Reynolds, such third party was in possession of the premises, and, second: Whether he was then the agent of King, as to this piece of land. The sole question raised by this record is: Whether it was the duty of the lessor, King, to put Reynolds in possession, or, was it the duty of the latter to take steps to obtain the possession. It is claimed for appellee that this duty rested on King, as one of the implied stipulations in the contract of letting.

The rulings on this question are irreconcilable. The English decisions are, that "he who lets, agrees to give possession, and not merely to give a chance of a law suit; and the breach assigned being, that the defendant did not give the plaintiff possession," it was held that an action could be maintained by the lessee against the lessor.—*Coe v. Clay*, 5 Bingham, 440. In that case the letting was by unwritten contract, the tenancy to commence presently. A prior tenant held over, and the lessee failed to obtain possession. The same ruling was made in the Exchequer Chamber, 11 Excheq. 775. The English decisions have been followed in Missouri. *L'Hussier v. Zallec*, 24 Mo. 13; *Hughes v. Hood*, 50 Mo. 350. Against this ruling will be found a majority of American decisions, commencing with *Gardner v. Keteltas*, 3 Hill (N. Y.) 330. In that case the lessee failed to obtain possession, by reason that the former tenant held over. The court said: "I admit the covenant of quiet enjoyment means to ensure to the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering into the possession by a person already in, under a paramount title, the action may be sustained. \* \* But, if the party holding is a wrongdoer, the remedy of the lessee is as perfect and effectual to dispossess him after, as that of the lessor was before, the execution of the lease. \* \* Upon the well settled construction of covenants of title and quiet enjoyment, it is not the duty of the landlord, when the demised premises are wrongfully held by a third person, to take the necessary steps to put his lessee into possession." *Gramiss v. Clark*, 8 Con. 36, and *Lawrence v. French*, 25 Wend. 443, are cited, but nothing decided in them sheds any light on the question we are discussing. Neither does *Nokes' Case*, 4 Rep. 80. *Pen-*

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*dergrast v. Young*, 21 N. H. 234, states this principle, referring to *Gardner v. Keteltas*, *supra*, but it is pure *dictum*. *Sigmund v. Howard Bank*, 29 Md. 324; *Underwood v. Birchard*, 47 Vt. 305; and *Gazzelo v. Chambers*, 73 Ill. 75, all follow the case in 3 Hill, and cite it as their authority. The older case of *Cozzens v. Stevenson*, 5 Serg. & R. 421, had asserted the same doctrine, and Taylor, "Landlord and Tenant," § 312, quotes from the case of *Gardner v. Keteltas*, and approves it, as the American doctrine, while admitting the English doctrine to be different.

With all due respect for the eminent jurists by whom the decisions in 5 Serg. & R., and in 3 Hill, were pronounced, it appears to us that in one phase of the question the argument is faulty. The principle applicable to the case of the lessee's eviction by the lessor himself, or, by a title paramount to that of the lessor, certainly rests on impregnable grounds. Such eviction is a breach of the implied covenant in every lease in general terms, for quiet enjoyment, and, at once, bars the lessor's right to recover rent, and confers on the lessee a right of action, for the lessor's breach of covenant. And when the lessee can not maintain his possession, in consequence of the lessor's want of title to uphold his, the lessee's possession, the latter need not wait for eviction, but may yield possession, and sue his lessor for the breach—he taking on himself the *onus* of proving the inability of the lessor to protect his possession by a valid title. And so, when there is no impediment to the possession, at the time fixed by the terms of the lease for the lessee to take possession, it is no breach of the covenant of quiet enjoyment, if a trespasser without title subsequently enter and evict the lessee in whole or in part. The lessee must meet such intrusions as that. But how about the implications at the time—the very moment—fixed by the terms of the lease for the lessee to take possession? Who is responsible if there is a trespasser, or tenant holding over, *then* in possession? Must the lessor clear the possession, or is this duty cast on the lessee? This question we do not understand to be fairly met in the following authorities: 1 Washb. Real Prop. 427, (325); *Moore v. Weber*, 71 Penn. St. 429. In Indiana, the implications are, that it is the duty of the lessor to deliver possession.—*Spencer v. Burton*, 5 Blackf. 57; *Clark v. Butt*, 26 Ind. 236. In Illinois—73 Ill. 75; in New York, *Gardner v. Keteltas*, 3 Hill 330—it would seem they have statutes authorizing a lessee to dispossess a trespasser found in possession, or tenant holding over, by summary remedy. In this State, no statute exists by which a tenant, not having had prior possession, can evict such intruder by summary proceeding. The lessor,



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in such case, could invoke our summary remedy.—Code of 1876, §§ 3696–7, *et seq.* Such actions lie for unauthorized disturbances of prior actual possessions, and title can not be inquired into.

The authorities being in conflict, how does this question stand on principle? As was said in *Coe v. Clay*, 5 Bing. 440—decided long before *Gardner v. Keteltas* was—one who accepts a lease, expects to enjoy the property, not a mere chance of a law suit. A lease for a year, or term of years, is not a freehold. It is a chattel interest. The prime motive of the contract is, that the lessee shall have possession; as much so, as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract. When a chattel is sold, the thing itself is delivered. When realty is the subject, still there must be livery of seizin. Formerly, parties went upon the land, and there symbolical delivery was perfected. Now, the delivery of the deed takes the place of this symbolical delivery. Still, it implies that the purchaser shall have possession; and without it, it would seem the covenant for quiet enjoyment is broken. Up to the time the lessee is entitled to possession under the lease, the lessor is the owner of the larger estate, out of which the leasehold is carved, and ownership draws to it the possession, unless some one else is in actual possession. The moment the lessor's right of possession ceases by virtue of the lease, that moment the lessee's right of possession begins. There is no appreciable interval between them, and, hence, there can be no interregnum, or neutral ground between the two attaching rights of possession, for a trespasser to step in and occupy. If there be actual, tortious occupancy, when the transition moment comes, then it is a trespass or wrong done to the lessor's possession. If the trespass or intrusion have its beginning after this, then it is a trespass or wrong done to the lessee's possession; for the right and title to the property being then in the lessee for a term, it draws to it the possession, unless there is another in the actual possession.—Taylor, Landlord and Tenant, §§ 14–15; 3 Wash. Real Prop. 117–18.

We hold that when there is a contract of lease, and no stipulations to the contrary, there is an implied covenant on the part of the lessor, that when the time comes for the lessee to take possession under the lease, according to the terms of the contract, the premises shall be open to his entry. In other words, that there shall then be no impediment to his taking possession. But this implied covenant or agreement does not extend beyond that time. If, after the time when the lessee is entitled to have the possession, according to the

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terms of the contract, a stranger trespass on, or take possession and hold, this is a wrong done to the lessee, for which the lessor is in no way responsible. And this is the rule, whether the trespass is committed before or after the lessee obtains actual possession. The lessor's covenant extends no farther than to guaranty he had authority to make the lease, and that the premises will be open for occupancy, when the contract gives to the lessee the right to enter.

The lease in this case was made to take effect as soon as the lessee complied with his part of the contract, by paying and securing the rent. When he did that, he was entitled to the possession. Was a trespasser then in possession of the premises, so as to forbid his taking possession? If so, King's implied covenant of quiet enjoyment was broken. The bill of exceptions informs us that the testimony on this point was in conflict. It became necessary then to submit this question to the jury. The defendant, appellant here, requested the following written charge: "When the defendant leased the land to the plaintiff, the contract of leasing transferred to the plaintiff all the possession the defendant had; and if a trespasser afterwards went into possession, his acts were a trespass against the lessee, and not against the landlord." This charge was refused, and defendant excepted. This charge was based on one phase of the testimony, namely: that portion which tended to show that the trespasser, or third party, was not in possession, until after Reynolds' right to take possession under the lease had accrued. If the possession was open when the contract was completed, on the part of Reynolds, then the trespass afterwards gave him no right of action against King. His sole recourse would be against the trespasser. The charge requested ought to have been given.

Reversed and remanded.

## **Parker et al. v. Jones' Adm'r et al.**

*Bill in Equity to establish and enforce Resulting Trust.*

1. *Statute of limitation; when not considered by Supreme Court.*—This court will not consider the effect of the statute of limitations, as a defense to a bill in equity, unless properly raised by the pleadings.

2. *Same; facts taking plaintiffs' case out of, introduced by amendment.*—When the statute of limitations is set up as a defense to a bill in equity, any partic-

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ular facts taking the plaintiffs' case out of the operation of the statute, must be introduced by amendment to the bill, or by special replication to the plea.

3. *Trust funds; when may be followed by cestuis que trustent*—As long as trust funds, or the proceeds of trust property, can be satisfactorily traced and identified, the *cestuis que trustent*, if proper parties complainant, and entitled to relief, may follow them into the hands of third persons, although such person may have taken the title to the property purchased with the trust fund in his own name, or in the name of any other person, with notice of the facts, but the evidence in this case, as held by the Chancellor, fails to trace the trust funds into the property sought to be changed.

This was a bill in equity, filed on the 14th of December, 1874, by Virgil E., Lamartine W., and Caledonia J. Parker, against Naomi C. Jones, as administratrix of the estate of John W. Jones, dec'd, and Wm. A. Jones, and others, as the heirs of John W. Jones. The bill alleged that Dr. Robert Parker, the father of complainants, died intestate, in Texas, in 1857, leaving property valued at twenty-five hundred dollars, which their mother Naomi C. Parker converted into money, and brought with her to Cherokee county, Alabama, in October, 1857. The mother of the complainants married John W. Jones, and shortly afterwards, delivered to him \$1800 of the money realized by her from the estate of Dr. Robert Parker. Complainants, it is averred, were infants of tender years at this time, and said Jones had full notice that the money received from his wife belonged to the estate of said Parker; that said Jones purchased with said money a tract of land situated in Cherokee County, Alabama, and took the title thereto in his own name. Said Jones died intestate in Cherokee county, leaving Wm. A. Jones, Caroline Johnson, and others as his heirs at law. That his widow, said Naomi C. Jones, had taken out letters of administration on the estate of said John W. Jones, and was proceeding with the administration thereof. The bill prayed that the title to the land described therein, might be divested out of the heirs at law of said John W. Jones, and invested in complainants. The respondents answered, denying the material allegations of the bill.

The evidence in the case tended to show, that at the time Mrs. Jones delivered the money to her husband, John W. Jones, it was understood between them, that all the property belonging to Jones, and this money, should be united and used as a common fund for the benefit of the children of each of them. The land sought to be charged, was purchased by Jones at a sale made by an administrator, under orders of court, but no record evidence of the terms of the sale was introduced, nor was the deed produced, or any proof made that the administrator had authority to sell the land. The only proof that the money delivered by Mrs. Jones (Parker)



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to John W. Jones, was used by him in the purchase of the land, was the admissions of said Jones, but these were coupled with statements as to the agreement to use his money, and that derived from his wife, for the mutual benefit of their children. The Chancellor dismissed the bill, and his decree is assigned as error.

CLOPTON, HERBERT & CHAMBERS, for appellant.

MCSADDEN & BRADFORD, for appellees.

SOMERVILLE, J.—No point is raised in this case, in the court below, in reference to the statute of limitations, either by demurrer to the bill, or by the answer of the several defendants.

Such defense can be considered by the appellate court, only when properly raised by the pleadings. If, in such event, there is any reason for accepting the given case from the operation of the statute, it must be introduced by an amendment to the bill, or raised by way of special replication to a plea.—*Ragland's Ex'rs v. Mortou*, 41 Ala. 344; *Nimmo v. Stewart*, 21 Ala. 682.

The complainants, as the heirs and distributees of Robert Parker, deceased, on whose estate there was no administration, seek to have a trust declared in their behalf in certain lands, alleged to have been purchased by one John W. Jones, in his own name, with funds belonging to the estate.

The rule is, that *cestuis que trust*, if proper parties complainant, and entitled to relief, can follow the proceeds of trust property, or funds, into the hands of third persons, so long as the same can be satisfactorily traced and *identified*, although such person may have taken the title of property purchased with the trust fund in his own name, or the name of any other person with notice of the facts.—2 Perry on Trusts, §§ 828, 835-8; *Maury's Adm'r v. Mason's Adm'r*, 8 Port. 211; *Robison v. Robison*, 44 Ala. 227.

Under the facts of this case, we cannot see that the Chancellor erred in deciding, that the legal testimony failed satisfactorily to trace the trust fund into the lands in controversy, and this of itself, is fatal to the equity of the bill.

The decree of the Chancellor is affirmed.

[Scaife &amp; Co. v. Stovall.]

## Scaife & Co. v. Stovall.

### *Statutory Claim Suit.*

1. *Landlord's lien under former statute* (Rev. Code, § 2963), *did not follow crop into hands of purchaser without notice.*—Under the former statutes (Rev. Code, §§ 2961-63), giving the landlord a lien on the rented lands for the rent of the current year, and a remedy by attachment to enforce it, it was expressly provided that such attachment might be levied on the crop in the possession of the tenant, or of any one holding it in his right, or in the possession of “a purchaser from him with notice of the lien”; which words were held to prevent, by necessary implication, the lien from following the crop into the hands of a purchaser without notice, though it continued after the removal of the crop from the rented lands, and until it passed into the hands of such a purchaser.

2. *Landlord's lien ; liability of crop in hands of purchaser determined by common law.*—Under the present statutes (Code, §§ 3467-78), the lien is extended and enlarged in some respects, but is silent as to the persons in whose possession the crop may be levied on by attachment, leaving that question to be determined by the principles of the common law.

3. *Landlord's lien ; nature and characteristics of.*—The landlord's lien is an incident, attached by the statute to the relation of landlord and tenant, and is a simple legal right to charge the particular property with the payment of the particular debts, and it does not change the ownership of the crops, which resides in the tenant, nor put any restraint on the tenant's unqualified right to their enjoyment, except such as is necessary to preserve the lien, as the primary charge for the satisfaction of the preferred debts.

4. *Same ; against whom it prevails.*—The landlord's lien prevails against the tenant, while he has possession of the crops, and against volunteers and purchasers from him, with notice.

5. *Same ; against whom it does not prevail.*—The landlord's lien will not prevail against those who purchase from the true owner, for a valuable consideration without notice of the lien, and after the removal of the crops from the rented premises.

6. *Statutes ; read and construed with reference to the common law.*—Statutes are always read and construed in the light of the common law, and are not regarded as infringing on its rules and principles, except so far as may be expressed, or fairly implied, to give them full operation.

7. *Same ; effect of charge on property created by.*—When, by a statute, a charge is created on property for the satisfaction of a debt, unless the intention is clearly expressed, or is matter of just implication, it can not be intended that such charge has a superiority, which the common law does attach to similar charges, especially a superiority which that law has carefully withheld.

8. *Larceny ; removing or selling property on which another has a claim, is not.* Although the statute (Code, § 4533), declares that a tenant, or other person, who, with an intent to hinder, delay or defraud, removes or sells, property on which another has a valid claim, may be punished as if he had stolen it, yet it does not convert the sale, or removal into larceny, nor does it prevent an innocent purchaser from acquiring a good title.

APPEAL from Barbour Circuit Court.  
Tried before Hon. H. D. CLAYTON.

[Scaife &amp; Co. v. Stovall.]

On the 17th of December, 1878, George W. Stovall procured an attachment to be issued against W. F. Shannon and A. Bethune. The attachment was issued on the ground that Shannon & Bethune, being indebted to said Stovall for rent and advances, had removed part of the crops grown on the rented premises without the consent of the landlord, Stovall, and without paying the rent. This attachment was levied on certain cotton, which was, thereupon, claimed by Scaife & Co., the appellants, who put in a claim bond, and this claim suit was tried at the Spring Term, 1879, of the Barbour Circuit Court. On the trial, the plaintiff in attachment testified that he rented certain lands in Barbour county to the defendants in attachment for 1878, and made advances to them during that year; that the rent had been paid but the defendants still owed him \$200 for the advances; that the contract of renting and for advances was verbal, and that the cotton levied on, was grown on the lands rented by him to the defendants in attachment, in said year. The claimants then offered to introduce E. W. Bostick, of Scaife & Co., and Shannon, one of the defendants in attachment, to prove by them that the said cotton had been sold to Scaife & Co. before the levy of the attachment thereon, and that said Scaife & Co. purchased said cotton, and paid for it, without having any knowledge or notice that said Stovall had any lien, or any claim thereon for rent or advances made by him to the said defendants. The court refused to permit this testimony to be introduced, and to this ruling the claimants excepted. The court, at the request of the plaintiff in attachment, charged the jury, "that if they believed the evidence they must find the cotton, claimed by Scaife & Co., subject to the plaintiffs' demand." The claimants excepted to this charge. There was a verdict for the plaintiff in attachment, and also, a judgment in his favor in the claim suit. The claimants bring the case to this court, and assign the ruling of the court on the evidence, and the giving of the charge, as error.

JNO. M. MCKLEROY, for appellants.—The only question in this case is, whether or not a landlord can enforce his lien for advances on a part of the crop, which the tenant has sold to a third party, and received pay for, such third person having purchased without notice of the landlord's lien. The lien of the landlord does not give him any right of property in the crops.—*Hussey v. Peebles*, 53 Ala. 432. The tenant is the owner of the crops, and has the legal title to them, and the right to sell them. The landlord's right, at common law, to distrain for rent was limited to the right to levy on the crop on the premises before the termination of



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the lease.—*Lomax v. LeGrand*, 60 Ala. 537. Our statutes modifying and adopting the common law on this subject, extended the lien, and enlarged the remedy for its enforcement. By statute, prior to February 9th, 1877, the lien was so extended as to follow property wherever it may be, without regard to whether the lease had expired or not, *so long* as it continued in possession of the tenant, or any one holding in his right, or in the possession of a purchaser from him with notice of the lien of the landlord.—Revised Code, § 2963. These clauses quoted from § 2963 of the Revised Code are not carried forward into the Code of 1876, but by act of Feb. 9th, 1877 (Acts 1876-7, p. 74), the law was so modified as to leave them out. The same act declares a lien in favor of the landlord for rent and advances, authorizes the assignment of the debt, and the lien for its enforcement, and declares that the attachment to enforce it may be levied “upon the crop, or the *proceeds* thereof, and upon the articles advanced,” &c.—Code, 1876, §§ 3467-3473, inclusive.

Appellee contends that the effect of this change in the statute law is to enlarge the lien so as to make it attach to the crop even in the possession of a purchaser, for valuable consideration, without notice of the lien. It seems to me that a contrary effect should be ascribed to it. Sec. 2963, Rev. Code, *extended* the lien beyond what it was at common law. The repeal of that section would have *restricted* it to what it was before, unless the repealing statute had, also, *extended* it in *other directions*.

Certainly there is nothing in the later law, and which was in force in the year 1878, when the lease in this case was made, which overrides the common law principles as to the rights of *bona fide* purchasers.

It surely was not contemplated by the legislature to permit landlords to follow the crops into the hands of *bona fide* purchasers without notice, who had bought in the usual course of trade, and with no means of ascertaining, perhaps, the existence of liens.

The landlord has a summary remedy, which he can, and which he ought to, enforce before the property goes into the hands of *bona fide* purchasers. If he is prevented from enforcing the summary remedy against the crop itself, then the statute permits him to attach the “proceeds,” if they can be got at. Failing in this, he has his action on the case against any purchaser *with notice*. And to still further protect his rights, a penalty is denounced against the tenant who unlawfully disposes of the crop, and also, against any one who purchases with notice, and with intent to defraud. After all these remedies, and favors, and protection given to

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landlords, it must not be construed that *bona fide* purchasers have no rights, which the law will respect. The law is intended *in pari materia*, and as applicable to both.

G. L. COMER, for appellee.—Under section 2963 of the Revised Code, an attachment could not be levied on the crop grown on rented land after it has passed into the hands of a purchaser, without notice of the landlord's lien. All the decisions of this court are based on that statute, and none of them have any reference to § 3473 of the Code of 1876, which is entirely different from the former law. The Code of 1876 (§ 3473), provides that the attachment for rent may be levied on the crop, or the proceeds thereof, and says nothing about a purchaser with or without notice, but it does expressly declare that it may be levied on the crop, wherever found, without regard to whose possession it is in. Section 4353 of the Code of 1876 makes it larceny for the tenant to remove any portion of the crop grown on rented land, on which there is a lien for rent or advances. This was done by the tenants in this case, and to permit appellants to retain the crop bought from the tenant, would be allowing them to acquire a title through a third person, who, as against the rightful owner, the landlord, committed a felony to get it—this the courts will not permit.

BRICKELL, C. J.—The single question this case involves, is, whether a landlord having a lien for rent and advances, or for either, can enforce it by attachment on the crop in the possession of a purchaser from the tenant, after its removal from the rented premises, for a valuable consideration, having no notice of the lien. To this precise question, we intend confining our opinion, which, we may remark, could not have arisen under the old statute creating and defining the lien of a landlord, upon crops grown on rented premises, the legal remedy for the enforcement of which, was an attachment to be "levied on the crop in the possession of the tenant, or any one holding it in his right, or in the possession of a purchaser from him, with notice of the lien of the landlord," and which was incorporated in the Revised Code of 1876, forming §§ 2961–63. The obvious effect and operation of that statute was, the preservation of the lien on the crop, though the relation of landlord and tenant was dissolved, and the crop removed from the premises rented, until it passed into the possession of a purchaser without notice, and such was the construction it received.—*Governor v. Davis*, 20 Ala. 366; *Lomax v. LeGrand*, 60 Ala. 537. The lien was not so frail, and was clearly distinguishable from

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that the landlord had at common law, upon goods and chattels on the demised premises, which could be enforced only so long as they remained upon the premises. They could be distrained during the term, and the right was lost by their removal before distress.

The removal of the crop, or any portion thereof, from the rented premises, without the consent of the landlord, was one of the facts which authorized a resort to attachment for the enforcement of the lien. So long as the crops remained on the premises, the tenant did not have a possession of them severed and distinct from his possession of the premises, and of itself, as is the possession of all personal property, capable of a visible, tangible possession, *prima facie* evidence of ownership. When removed from the premises, he had a separate, distinct possession, affording *prima facie* evidence of ownership, and of its incidents, the right to sell, or otherwise dispose of them. Then, if the landlord sought to follow the crop into the hands of a purchaser, and fasten the lien upon them by attachment, notice to the purchaser must have been traced.—*Lomax v. LeGrand, supra*.

This statute has been, however, repealed, and superseded by subsequent legislation which forms the 9th chapter of the 3d Part, and Title 2d, of the Code of 1876, §§ 3467-78. A lien is given the landlord not only for rent for the current year, but for advances made by him to the tenant, or made by another at his request, for which he assumes legal responsibility, whether in money, or other thing of value. The lien can be enforced by attachment by the landlord, or his assignee, whenever either the claim for rent, or that for advances is due, and the tenant, after demand, fails or refuses to make payment. Or, whether the claim is due or not, if there is reason to believe that the tenant is about removing the crop from the premises, or otherwise disposing of it. Or, when he has, without the consent of the landlord, or of his assignee, removed from the premises, or otherwise disposed of any part of the crop without payment of the claims for rent and advances. Or, when he has disposed of, or there is good cause to believe he is about disposing of, the articles advanced or obtained with the money advanced, &c., an attachment for the enforcement of the lien may be issued. The attachment "may be levied upon the crop or the proceeds thereof, and upon the articles advanced, or property purchased with money advanced or obtained by barter in exchange for articles advanced." The present, as the former statute, creates by its words, a *lien*, a charge upon the crops and other property therein designated. There is no change of ownership—that resides in the tenant, as it would have



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resided in the absence of the statute. Nor is there any other restraint upon the incidents of ownership—upon the tenants unqualified right of enjoyment, than such as is necessary to preserve the lien, as the primary charge for the satisfaction of the favored debts. It is an incident to the relation of landlord and tenant attached by the statute, not having any element of a *jus in re*, or a *jus ad rem*, but a simple legal right to charge the particular property with the payment of the particular debts, in preference to, and in priority of all other debts. The lien will of course prevail against the tenant himself so long as he has possession, and so it will prevail against volunteers, and purchasers from him having notice, though upon a valuable consideration, for neither the volunteer, nor the purchaser with notice, can have any equity to protection against it, and must be presumed, unless fraud is imputed, to intend taking in subordination to it. Of this lien it may be said, that it is *secret*, for of it, notice is not required to be given in any form, and if the contracts between landlord and tenant, rest in words only, not reduced to writing, as is probably most often the case, the notice cannot be given. Such liens are not according to any principle of law known to us, allowed to prevail against purchasers from the true owner, for a valuable consideration, without notice. They differ materially from the liens known to the common law, as that of a factor, or of an innkeeper, or a common carrier, or an artificer, continuing so long only as possession remained, and ceasing whenever there was a parting with possession. The possession gave notice of the lien, or at least it was enough to excite inquiry which would lead to actual notice, and of consequence, there would never be a *bona fide* purchaser claiming in opposition to it. The ownership, and the possession, residing in the tenant, when the crop is removed from the premises, a separate, distinct possession of the crop only, must furnish a security to all who deal with him in good faith and for value, or there would be great embarrassments and but little safety in dealing in the agricultural products of the country. We speak only of purchases made after the removal of the crop from the premises, for that is the case before us, and we do not intend our opinion to extend beyond it. Against every analagous right or lien springing up from the contract or relation of parties known to, recognized and enforced by law, not the mere creature of a statute, a *bona fide* purchaser is protected. It may well be said, the law delights in his protection, and regards it as a wise policy, founded in the demands of justice, promotive of commerce, to save him from mere charges or incumbrances of the ownership, of which

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he cannot by any prescribed measure of diligence acquire notice. Statutes are always read and construed in the light of the common law, and are not regarded as infringing upon its rules and principles, save so far as may be expressed, or fairly implied to give them full operation. When a charge merely upon property is created by statute—a mere primary right for the satisfaction of a debt, it cannot be supposed, unless the intention is clearly expressed, or it is matter of just implication, that it is intended the charge shall have a superiority, the common law does not attach to similar charges, and especially a superiority that law carefully withholds. Though it was matter of necessary implication from the words of the former statute, that the crop could be levied on in the hands of a purchaser from the tenant with notice of the lien, that it could not be taken from a purchaser without notice, in that respect, the statute was merely in recognition of the principle of the common law, which would have prevailed if it had been silent. All that can be said is, that the present statute is silent as to the persons in whose possession the crop may be levied on by attachment, leaving that question, if a controversy arises as to it, to be determined by the common law, and that law intervened for the protection of the *bona fide* purchaser, who has equal equity with the landlord, and the legal title attached to it. The reasonable implications from the statute support this view. For the removal, or the intended removal of the crop, furnishes a cause for the attachment of it, before the claims, which are liens, fall due. The reason must be that the removal endangers the lien, and one of the perils operating its defeat, was, it is fair to presume, that the rights of a *bona fide* purchaser might intervene in consequence of the removal. The attachment may also be levied upon the *proceeds* of the crop, which indicates that a conversion of it by sale or otherwise, might be made, and a purpose to extend the lien to whatever was realized therefrom by the tenant. There is no express abrogation of the principle of the common law protecting a *bona fide* purchaser from mere liens of which he has no notice, and no provision which would authorize a construction that there was an intention to abrogate it. Protection to such a purchaser, renders the statute harmonious in its operation with the principle of the common law in reference to all analogous liens or charges, and saves the lien from clogging and embarrassing fair commerce in agricultural products.

We cannot attach any force to the argument that because a tenant, or other person, who, with an intent to hinder, delay, or defraud, removes or sells property upon which an-

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other has a valid claim, may be punished as if he had stolen it (Code of 1876, § 4353), therefore, no good title can be derived from him. The statute does not, as is argued, convert the sale or removal into larceny, and an indictment for larceny founded on it could not be sustained.—*La Vaul v. State*, 40 Ala. 44. It is in recognition of the ownership, and visits the punishment of larceny upon the fraudulent exercise of the rights and incidents of ownership.

The rulings of the Circuit Court are not in conformity to these views, and its judgment must be reversed, and the cause remanded.

## Shields v. Atkinson.

*Trover against Commission Merchants, with Counts for damages for violating instructions in selling cotton.*

1. *Surety on rent note; when has the right to recover value of crop from merchant, appropriating it for advances when delivered to pay rent.*—When a tenant delivers part of his crop to a surety on his note for rent, to be used in paying rent, and the latter forwards it to commission merchants, to be used for that purpose, and they, in violation of instructions, apply it in payment of advances made by them to the tenant, such surety may, after paying the rent, recover the value of the crop so delivered to them.

2. *Same; same.*—In such case, the rent being the paramount charge on the crop, the surety has a property in, and a right to hold it, and apply it to the payment of rent, and may recover its value, although it was delivered to him for the double purpose of paying rent, and advances.

APPEAL from Selma City Court.

Tried before Hon. JOHN HARALSON.

This was an action, brought by R. W. Atkinson, against W. B. Shields, as surviving partner of the firm of Williams & Shields. The material facts of the case are stated in the opinion of the court. There was a judgment for the plaintiff, and its rendition is the error assigned.

JOS. F. JOHNSON, and E. W. PETTUS, for appellant.

W. M. BROOKS, for appellee.

STONE, J.—As we understand the evidence, there is no dispute, or ground for dispute, that for the year 1873, L. B. & O. F. Atkinson leased a plantation of Burge, executor of Hope, at the agreed rent of some four hundred and fifty



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dollars, and that R. W. Atkinson became their surety, in a note given to secure the rent ; that L. B. & O. F. Atkinson cultivated the plantation during that year, and made thereon a crop of cotton and corn ; that at the end of the year 1873, they delivered, or turned over to R. W. Atkinson, three of the bales of cotton grown on the said plantation that year ; that in the month of December, R. W. Atkinson shipped the said three bales of cotton to Milhous & Shields, cotton factors of Mobile, marked R. W. A., and accompanied the shipment with a letter to them, in which he said : " I ship you four [three] B. C. \* \* which is some of L. B. & O. F. Atkinson's cotton, which you will please hold as long as there is any probability of it rising. The proceeds of this lot is to be appropriated to the payment of their rents, for which I am security. \* \* \* I drew draft on you in favor of H. W. Burge, Ex't. Est. Jno. Hope, dec'd, for \$200, rents L. B. & O. F. Atkinson, which please accept now, and pay 1st January 1873. (Signed). R. W. Atkinson." That R. W. Atkinson did draw the draft on Milhous & Shields, in favor of Burge for two hundred dollars, which, when presented, Milhous & Shields refused to accept, or pay ; that during the year 1873, Milhous & Shields had advanced to L. B. & O. F. Atkinson some four hundred dollars, to enable them to make said crop, and had taken from them a mortgage on said crop to secure its payment, which mortgage was duly recorded ; that Milhous & Shields sold the three bales of cotton for \$208 net, and applied the proceeds to the credit of L. B. & O. F. Atkinson, and refused to account for such proceeds to R. W. Atkinson ; that said R. W. Atkinson has paid Burge his rent claim in full, and now sues to recover the proceeds of said three bales of cotton from Shields, surviving partner of Williams & Shields. There are two discrepancies in the evidence—one material, and the other immaterial. R. W. Atkinson testifies that L. B. & O. F. Atkinson turned over to him the three bales of cotton, to apply the proceeds towards the payment of the rent. L. B. Atkinson testifies that the cotton was turned over to R. W. Atkinson to pay the advances, and the rent. Both concur in saying the cotton was delivered to R. W. Atkinson, and there is no testimony in conflict with this. Now, whether delivered for the single purpose of paying the rent, or for the double purpose of paying the rent and advances, it authorized R. W. Atkinson to apply it towards the rent—that being the primary and paramount charge upon it. Being delivered to him, R. W. Atkinson acquired a property in, and right to possess, and hold the cotton, of which no one could deprive him, without first paying the rent, and relieving him from liability therefor. Shields' mort-

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gage lien was inferior and subordinate to the lien for rent. Code of 1876, § 3467 *et seq.* and § 3286; *Stern v. Simpson*, 62 Ala. 194; *Abraham v. Carter*, 53 Ala. 8; *Ellis v. Martin*, 60 Ala. 394; *Smith v. Bryan*, *Id.* 235; *Westmoreland v. Foster*, 60 Ala. 448.

The testimony is also in conflict, on the question whether L. B. and O. F. Atkinson re-paid to R. W. Atkinson the rent which he had paid to Burge, the landlord. R. W. testifies positively that they had not re-paid him, while the testimony of L. B. tends to show, that he and his brother, O. F., had turned over to their brother sufficient property to discharge both the lien for rent, and the liability for advances. L. B. testifies at a distance from the scene of the transaction, with no mention of documents or memoranda, to aid his recollection, and with a very general and indefinite statement of recollected premises from which he draws his conclusions. We think the testimony of R. W. Atkinson is entitled to more consideration and weight, than that of L. B. Atkinson, and we concur in the judgment rendered by the Selma City Court in this cause.

Affirmed.

## Tecumseh Iron Company v. Mangum.

### *Motion to Re-tax Costs in Action of Trover.*

1. *Trover; when no more costs than damages recoverable in.*—When the damages recovered in an action of trover do not exceed twenty dollars, it is error to render judgment for more costs than damages, unless the presiding judge certifies that greater damages should have been awarded; and it will not be presumed on error, in the absence of an express recital in the record to that effect, that the certificate was made.

2. *Re-taxing costs, to what objections motions for, are confined.*—Motions to re-tax costs are confined to objections to the taxation made by the clerk or other ministerial officer of the court, and do not open inquiry into the merits of the judgment, which the clerk is bound to pursue in taxing the costs.

APPEAL from Cherokee Circuit Court.

Tried before Hon. JOHN HENDERSON.

James M. Mangum brought an action of trover against the Tecumseh Iron Company, claiming twenty-five hundred dollars, as damages, for the conversion of certain timber trees felled by said company, and recovered a judgment for three dollars and seventy-five cents, and "all costs in this behalf expended." The clerk taxed all the costs of the case against

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the defendant, who made a motion to re-tax them, alleging that no certificate had been made by the presiding judge that greater damages should have been awarded. The court denied the motion, and the defendant appealed to the Supreme Court, assigning the refusal of the motion to re-tax the costs as error.

DENSON & DISQUE, for appellants, cited § 3129 of the Code to show that the motion to re-tax costs should have been granted.

No counsel marked for appellee.

*Per Curiam.*—The damages recovered by the appellee, not exceeding twenty dollars, if the presiding judge did not certify that greater damages should have been awarded, it was erroneous to render judgment against the appellant for more costs than damages.—Code of 1876, § 3129. The statute is very general in its words, and embraces every action *ex delicto*, whether the injury is to person or property. The action of trover was not embraced in the statute of 1822, (Clay's Dig. § 21, 316), which in terms was confined to actions for slander, or trespass, or assault and battery. But the present statute was purposely extended to all actions to recover damages for torts, and not confined, as was the former statute, to specific actions *ex delicto*. On error, it could not be intended, in the absence of an express recital of the fact on the record, that the certificate of the judge was made, and the rendition of the judgment for more costs than damages, would be an error for which this court would reverse, and cause the proper judgment to be rendered.—*Galls v. Lynch*, 21 Ala. 579.

The case is before us now, however, on appeal from the judgment rendered on the motion to re-tax the costs. A motion to re-tax costs, is confined to objections to the taxation made by the clerk, or rather ministerial officer of the court. It does not open objections, or an inquiry into the merits of the judgment, which the clerk pursues, as he is bound to do in making the taxation.—2 Tidd. Pr. 990. However erroneous may be the original judgment, the error could not be remedied on the motion made to the Circuit Court, and the court did not err in the judgment rendered on it.

Affirmed.



[Norman v. Burns.]

## Norman v. Burns.

### *Bill in Equity for Relief against Judgment at Law.*

1. *Res adjudicata*; rule applies in courts of equity as well as in courts of law. The principle, that a controversy which has been adjudicated by a court of competent jurisdiction, can not be re-opened by the same parties, or their privies, is obeyed in courts of equity, as well as in courts of law.

2. *Judgment at law*; when equity will relieve against.—Although the jurisdiction is exercised cautiously, and sparingly, yet, if a party against whom a judgment at law has been rendered, shows by clear and precise allegations, supported by convincing proof, that he was without fault in failing to assert his legal rights or remedies, or has been prevented by fraud, accident, or surprise, or by the act of his adversary, from availing himself of them, and that the judgment is unjust, and oppressive, a court of equity will grant relief against it.

3. *Same*; when equity will not grant relief against.—A court of equity will not relieve against a judgment at law, merely because it is erroneous, or because the Chancellor, from the evidence, would reach a different conclusion; nor will it grant relief on account of matters of pure legal cognizance, unless the party complaining acquits himself of all negligence in the assertion of his rights in the court of law, and the circumstances relied on to excuse the failure, must be shown to have been such that no exercise of diligence on his part could have guarded against them; a want of diligence being as fatal as the want of a valid defense, or the absence of any fact rendering it unconscientious to execute the judgment.

4. *Attorney*; authority to bind clients.—An attorney may bind his client by a written agreement, as to any cause or proceeding, (Code of 1876, § 796), or by an entry on the minutes of the court; but the courts are prohibited (Rule 17, Code, p. 156), from acting on any verbal agreement made by attorneys in a cause or proceeding.

5. *Judgment at law*; equity will not relieve against on ground that attorney violated verbal agreement in taking it.—A court of equity will not grant relief against a judgment at law, when the only defense was payment before its rendition, and the only reason shown for a failure to defend, was the verbal assurance of one of the attorneys for the plaintiff, that judgment would not be taken at the approaching term of court, and that he would correspond with his client, and try to secure an equitable adjustment of the controversy.

APPEAL from Talladega Chancery Court.

Tried before Hon. N. S. GRAHAM.

This was a bill in equity, and sought to perpetually enjoin a judgment at law, in favor of Norman *et al.* against Burns. The respondents answered denying the material allegations of the bill, and they also interposed a demurrer on the ground: 1. That the bill failed to show any facts which entitled the complainant to the relief sought thereby. 2. Because the bill showed that the complainant had failed to make any defense in the court of law, and failed to show a good and sufficient reason for such failure to defend. The

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testimony in the cause was directed to the question of the payment of the note, on which the judgment was founded, against the enforcement of which complainant prayed an injunction, and was conflicting, but owing to the view the court takes of the case it is unnecessary to set it out. The Chancellor overruled the demurrer, denied a motion to dismiss the bill for want of equity, and rendered a decree perpetuating the temporary injunction, which had been granted. The rendition of the final decree, and also the decree overruling the demurrer, are assigned as error.

TAUL BRADFORD, for appellant.

JOHN T. HEFLIN, for appellee.

BRICKELL, C. J.—The object of the original bill, in which the appellee is complainant, is to obtain relief from a judgment at law, rendered in favor of the appellants, Norman and S. L. Martin, in the Circuit Court of Talladega county, and against the appellee, as survivor of the late firm of Burns & McCain. The judgment is founded on a debt owing by Burns & McCain to S. L. & B. R. Martin, for tobacco by them sold and delivered to Burns & McCain. The original existence and justness of the debt is not disputed, but it is averred that before the commencement of the suit at law, it was paid in full to B. R. Martin, in the latter part of the year 1861, or early in 1862, and a receipt taken, which has been lost or mislaid. The note by which the debt was evidenced was not surrendered when the payment was made, because it was at Martin's residence in Virginia, and the payment was made at the residence of the appellee in Alabama. Before the payment was made, it is admitted, the appellee had received notice of the assignment and transfer of the debt to one Jesse Wooten, through, and from whom, the appellants, Norman and S. L. Martin, claim and derive title. The appellee was induced not to make defense to the suit at law, by the verbal assurance of Martin, one of the attorneys for the plaintiff in the suit, that it was unnecessary, as no judgment against him would be claimed at the term of the court at which judgment was rendered; and he would correspond with his clients, and endeavor to bring about an equitable and satisfactory settlement of the matter, and would inform the appellee of the result of his correspondence. In violation of these assurances, the judgment was taken, and the appellee was not informed thereof until more than four months after its rendition.

That a court of equity can not relieve against a judgment

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at law, merely because it may be erroneous, or because, in view of the evidence, the Chancellor would reach a different determination from that which may have been arrived at by the court of law, is well established. The one, and the other court, yields implicit obedience to the principle, that a controversy which has been adjudicated by a court of competent jurisdiction, shall not be re-opened by the same parties, or their privies. Yet, if a party, without fault or neglect on his own part, has been prevented by fraud, accident, surprise, or by the act of his adversary, from availing himself of his legal rights in a court of law, and avoiding an unjust, unconscionable judgment, a court of equity has jurisdiction to relieve him. The jurisdiction is exercised cautiously and sparingly, and only when by clear and precise allegation, supported by convincing evidence, the party not only acquits himself of all fault or negligence in failing to avail himself of his legal rights and remedies, but establishes that the judgment itself is unjust and oppressive, and that it is against good conscience to suffer it executed. "Without attempting," said C. J. Marshall, in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, "to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud, or accident, unmixed with any fault or negligence in himself, or his agents, will justify an application to a Court of Chancery." The doctrine has been acted upon, and is recognized in numerous cases in this court, and is so familiar that it is not necessary to refer to them specially.

The defense, and only defense, to the demand upon which the judgment at law is founded, is payment of it before the commencement of suit, a pure, legal defense of which the court of law had full and complete cognizance. The only reason for not making defense at law, assigned in the bill, is, the mere verbal assurances of one of the attorneys for the plaintiffs, that judgment should not be taken at the approaching term of the court of law; that he would correspond with his clients, and endeavor to procure a satisfactory adjustment of the matters in controversy. The authority of an attorney at law, in this State, is very large; and, because of its extent, the statutes and rules of practice, proceeding upon reasoning and principle, like unto that on which the statute of frauds is founded, declares that "an attorney has authority to bind



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his client, in any action or proceeding, by any agreement in relation to such cause, made in writing, or by an entry to be made on the minutes of the court," (Code of 1876, § 796), and that "no private agreement or consent, between the parties, or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either party against the other, unless the same be in writing, and signed by the party to be bound thereby."—Rule 14, Code of 1876, 160; Rule 17, 156. These rules of practice have existed for a long period. They can be traced back to 1830, (Aik. Dig. 455, Rule 14), and have been preserved in the same language in every subsequent revision of the rules by this court. The legislature was not content to leave them merely as rules of practice, the administration of which could be tempered by the courts to the exigencies and circumstances of particular cases. In the Code of 1852, the rule was in substance introduced as a statute, mandatory in its terms, and has since continued in each revision and codification of the statutes. If it is conceded that it was within the authority of Martin to bind his clients by the assurances and promises, it is averred he made so liberally, and the appellee intended reposing on them, he was admonished by the law, they could not afford him protection unless reduced to writing, and signed by the party to be bound thereby. Abstaining from causing them to be reduced to writing, and signed, was an abstinence from the measure of diligence the law imposed upon him, and it is far better that he should suffer damage from his own want of diligence, or his misplaced confidence, than that a precedent should be made lessening the dignity of judgments, and protracting strife and controversy. The appellee could, if he chose, repose in confidence upon the mere verbal assurances and promises of the attorney of the plaintiffs, but it was at his own peril. The law appointed the mode in which these assurances and promises could be made binding on the plaintiffs. Until in that mode they were expressed, the value which can be placed on them, is no greater than that which can be attached to the acts or agreements of mere strangers bearing no relation to the plaintiffs. The act of an attorney, or agent, exceeding authority, is of no greater force, than the act of one who, without authority, assumes to act for a principal. It was upon the good faith, the attention, and diligence of the attorney making these verbal assurances and promises, the appellee relied, and not upon his authority to bind the plaintiffs in the judgment. It may be their confidence was misplaced, but they trusted when the plaintiffs, nor the law, invited them to trust, and if evil is wrought they must accept it as the fruit of their own improvidence. Because

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of matters of pure legal cognizance, a court of equity will not relieve against a judgment at law, unless the party complaining acquits himself of all negligence in the assertion of his rights in the court of law. The highest degree of diligence is exacted from him, and if it is not exhibited, the court will not intervene. The circumstances which are relied upon to excuse the failure to defend at law, must have been such that no exercise of diligence on his part could have guarded against. A want of diligence, is as fatal as the want of a valid, substantial defense, or the absence of any fact rendering it unconscientious to execute the judgment.—*Mock v. Cundiff*, 6 Port. 24; *French v. Garner*, 7 Port. 549; *Drew v. Heaque*, 8 Ala. 438.

The decree of the Chancellor is reversed, the injunction heretofore granted is dissolved, and a decree is here rendered dismissing the original bill at the cost of the appellee in this court, and in the court of chancery.

## Warwick et al. v. Brooks.

### *Motion for Summary Judgment against Sheriff for Failure to Return Execution.*

1. *Summary judgment; error to render against sheriff for failing to return execution without the intervention of a jury.*—A motion for a summary judgment against a sheriff for failing to return an execution, is not an "action founded on a written instrument ascertaining the plaintiff's demand," and it is error in such a motion, to render a final judgment by default against the defendant, without the intervention of a jury, and without the introduction of evidence to establish his liability for the alleged neglect of duty.

### APPEAL from Perry Circuit Court.

Tried before Hon. G. H. CRAIG.

This was a motion made by W. M. Brooks against J. F. Warwick, sheriff of Talladega county, and the sureties on his official bond, for a summary judgment for the failure to return an execution. The judgment entry, after reciting the issuance of the execution, and the failure of the appellant to return it, continues as follows: "Said motion being heard, and considered by the court, is this day granted, and the said defendants (naming them) being called to come into court, come not, but make default. It is therefore considered by the court that the plaintiff recover of the defendants, the sum of seventy-two dollars, the damages in the premises,

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together with the costs in this behalf expended, for which let execution issue." The errors assigned are the rendition of the judgment by default, without the intervention of a jury, and without the introduction of evidence to establish the liability of the defendant for failing to return the execution.

GEO. F. MOORE, and TAUL BRADFORD, for appellants.

JOHN MOORE, for appellee.

SOMERVILLE, J.—This is a summary motion against the sheriff and his sureties for failing to return an execution within the time required by law. The Circuit Court rendered judgment final by default, on motion of plaintiff, without the intervention of a jury. The assignment of error based on this action of the court must be sustained. The motion is not an "action founded on any instrument of writing ascertaining the plaintiff's demand," within the meaning of section 3022 of the Code. There should have been evidence introduced to establish the truth of the statements, showing the liability of the defendants for the alleged neglect of duty. The issue in dispute could only be determined by the verdict of a jury, and was improperly adjudged by the court.—*Porter v. Burleson*, 38 Ala. 343; *Patterson v. Blakeney*, 33 Ala. 338; *Byrnes v. Haynes*, Minor. 286; 2 Brick. Dig., p. 135; § 61, *et seq.*

The judgment of the Circuit Court is reversed, and the cause is remanded.

## Talladega Insurance Company v. Peacock, Adm'r.

*Action on Promissory Note; Plea, non est factum.*

1. *Corporation; power to borrow money.*—A corporation, which is authorized by its charter to transact the business of life, fire, and marine insurance, receive money on deposit, collect promissory notes, and bills of exchange, lend money, and discount or sell such notes, or bills, and to "borrow money, and issue its bonds therefor," is not restricted, by the latter provision, to making loans secured by bonds, but has the incidental and implied power, common to all such corporations, to borrow money, and make negotiable, or non-negotiable paper, and give such securities as may be deemed most advantageous.

2. *Same; how persons proved to be officers of.*—Strangers can not be required to prove the appointment of officers, or agents, of corporations, by written



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evidence, but it may be inferred from the recognition, or continuous acquiescence, by the corporation in the acts of such officers.

3. *Same; presumption against, when it fails to prove appointment of officer.*—If there is written evidence of such appointment, it is within the peculiar knowledge, and in the exclusive possession of, the corporation, and whatever presumption can be drawn, on account of its absence, must be visited on the corporation, which has voluntarily assumed the attitude of neglecting, or refusing to produce, evidence which was in its possession.

4. *Evidence; when to be excluded.*—It is not often necessary, and it is but seldom that the court can prescribe the order in which a party may introduce his evidence, but when it is all produced, and it is wholly insufficient to support the cause of action, or the grounds of defense, or if any part of it is then irrelevant, because unconnected with other evidence, the court should, on motion, exclude all the evidence, or such unconnected part of it.

5. *Burden of proof; when on plaintiff, in suit against corporation.*—When, in an action against a corporation, on a note for money borrowed by its secretary, and which was executed by him, and signed with the corporate name, "by him, as secretary," the defendant interposes a sworn plea of *non est factum*, the burden of proof is on the plaintiff to show that such person was the secretary of the corporation, and was authorized to borrow money, before the note is admissible in evidence.

6. *Agency; how proved.*—The general rule is, that agency must be proved otherwise than by the mere act of the agent, before it can be assumed that such acts are binding on the principal; and the mere acts of the assumed agent, not accompanied by evidence tending to show that the principal had knowledge of, or assented thereto, are not competent evidence to be submitted to a jury.

7. *Same; same.*—But when there is any evidence tending to show the assent of the principal to the act of the agent these acts, in connection with the assent of the principal thereto, must go to the jury as evidence; and if the acts of the supposed agent are so continuous in their character, and of such a nature as to furnish, in themselves, any reasonable ground of inference that they were known to the principal, and that, in the absence of authority, he would not have suffered them, such acts are competent evidence to be submitted to the jury.

8. *Corporation; person may be proved to be officer of, by certain acts.*—Evidence that one openly and notoriously transacted the general business of a corporation, had possession and care of its office, in which the business was transacted, the custody of the books and papers, and the funds of the corporation, and had, on more than one occasion, borrowed money, which appeared on the books of the company, entered to the credit of the lender, tends to show the relationship of such person to the corporation, the duty and authority pertaining thereto, and might authorize a jury to infer that, in the absence of authority from the corporation, such acts would not have been permitted.

9. *Corporation; officer of, acting without authority, loss arising from, falls on corporation.*—If corporations, who select their own agents, with whom strangers must deal, hold out a particular officer, or suffer him to hold himself out as having particular or general authority, inviting dealings with him, and a loss must ensue thereby, such corporation must bear it, and not those who, so far as was known, or could be seen by them, dealt with the agent in the line, and within the scope of his duty and employment.

10. *Opinion; what statement by witness not regarded as.*—The opinion of a witness, or a conclusion drawn by him from facts, is not admissible evidence, but a statement by a witness, that he regarded a person "as the general agent" of the defendant corporation, does not fall within this rule, when connected with, and accompanied by statements as to the means and sources of the knowledge of the witness.

11. *Hearsay; statement by witness not.*—A statement by a witness, that "the money was loaned by his agent in 1860, and renewed annually until 1863," is not hearsay, although he subsequently stated that "meantime he was in the State of Texas," for he may have had personal knowledge of the loan and its renewals.

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12. *Secretary of corporation; authority to borrow money for corporation; how implied.*—Authority to borrow money for a corporation, by its secretary, may be implied from his relation to the company, the nature of his employment, the mode in which he was permitted to conduct its business, and his borrowing on other occasions; and a charge that he must have had express authority to borrow money, is erroneous, and properly refused.

13. *Charges must be based on the evidence.*—Charges which are not based on, and assert propositions of law about which no question arises on, the evidence in the case, are abstract and misleading, and are properly refused, without reference to whether they are correct or erroneous.

14. *Interest; when commences on contracts to pay money.*—Contracts for the payment of money bear interest from the day it becomes payable.

15. *Same; trivial error as to, will not reverse case.*—A note made April 6, 1863, and due one day after date, bears interest from April 7th, 1863, and a charge asserting that it bore interest from date is erroneous; but where, instead of calling attention to this error by a proper charge, an erroneous charge, "that no interest should be computed," was requested, the error should not avail to reverse the judgment.

### APPEAL from Talladega Circuit Court.

Tried before Hon. W. H. SMITH.

This action was brought November 7, 1865, by David McCullough, against the Talladega Insurance Company. The suit was founded on a promissory note, which is set out in full in the opinion of the court. The defendant pleaded, "in short by consent," 1, the general issue; 2, *non est factum*. The case was tried on these pleas. The plaintiff introduced in evidence the special act incorporating the Talladega Insurance Company (Acts 1855-6, pp. 257-61), and also the charter of the Tuskegee Insurance Company, to which that act refers. The provisions of the charter, so far as they are material in this case, are set out in the opinion of the court. The plaintiff testified that the business of the Talladega Insurance Company was banking, receiving deposits, &c.; that their place of business was in the town of Talladega, Ala.; that (1) J. G. L. Huey was the general agent of the Talladega Insurance Company in 1860, and for some years afterwards; that (2) Huey transacted all business for them in their office, and was the "big man of the nation," (meaning thereby that he was the principal man of the company); that he lent this company a sum of money, in American gold coin, which was, at the time, deposited with them; that (3) James Isbell, as his agent, lent the insurance company this gold, in 1860, at eight per cent. interest, and renewed the loan annually, until 1863, when the insurance company executed the note, which is the foundation of this suit—he having been in the meantime in the State of Texas; that (4) he had often seen Huey in the office of the insurance company, seeming to exercise a general control of their business; that (5) he regarded Huey as the general agent of the company. The plaintiff then offered in evidence the

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note sued on, but the defendant objected to its introduction; and the court expressing a wish to hear all the testimony in support of its admission, the plaintiff withdrew the offer to read the note, and introduced as a witness J. B. Huey, a brother of J. G. L. Huey, who testified, that (6) J. G. L. Huey was elected secretary of the Talladega Insurance Company, at its organization, and that he was generally known as their secretary; that he frequently assisted his brother in the office, and knew that he had charge of the company's business. Plaintiff then introduced F. M. Thomason, who testified that he had often transacted business with the company, and (7) had lent them money at three different times—at one time \$10,000, at another time \$10,000, and at still another time \$3,500; that he did not know (8) that the insurance company had borrowed money at any other times, except that it had borrowed from some bank in South Carolina; that (9) J. G. L. Huey had general charge of the business of the insurance company; that (10) witness let Huey have the money mentioned above; that (11) he often met members of the board of directors in the office of the insurance company, (12) and had business transactions with them there; and (13) they recognized J. G. L. Huey as secretary, and agent, of the company. A. W. Bowie testified that he was a director in the insurance company, and knew of only two instances in which the company had borrowed money, viz: once from a bank in South Carolina, and once from his father, Alexander Bowie, as administrator of the estate of Davis, and the special authority of the board of directors was first obtained in each of these cases. The other evidence in the cause appears in the opinion of the court. The plaintiff again offered the note, on which the suit was founded, in evidence, and the defendant objected to its introduction, but the court overruled the objection, and permitted it to be read to the jury; to which the defendant excepted. The defendant offered no evidence, but moved to exclude the portions of the evidence marked above 1, 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, as illegal, and to exclude the clause of the evidence marked 4 as hearsay, and that marked 7 as irrelevant and inadmissible, and also moved to exclude the testimony as a whole.

The court charged the jury, of its own motion, "that if you find for the plaintiff, your verdict must be, 'we, the jury, find for the plaintiff, and assess, as damages, the amount of the note, with interest thereon from date.'" To this charge, the defendant excepted. The plaintiff asked the court to charge the jury: 1. "That the defendant had the right to borrow money, and execute its note therefor, by the hands of



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its secretary." 2. "That the words in the defendant's charter, 'and issue its bonds therefor,' confers the power to make notes." These charges the court gave, and the defendant duly excepted. The court also charged the jury, at the request of the plaintiff, that, 1. "It is only necessary for the plaintiff to satisfy you, from the evidence, that Huey was the general agent of the defendant, and was held out to the world as such, to justify you in believing that he had the authority to bind the defendant, as claimed by the plaintiff, although no specific authority to borrow money be proved. 2. That agency is proved as any other ordinary fact, and may be established by inference, or implication, from other facts. 3. Such acts as it may be necessary to show that Huey performed, in order to establish the agency insisted on by plaintiff, need not be acts of borrowing money, but acts performed in the general conduct and management of the business the company was allowed by law to perform, if borrowing money was in the scope of the business of the company. 4. That it was not plaintiff's duty to establish Huey's agency, by any resolution of the company, if he could establish it otherwise. 5. That plaintiff was not bound to look behind the public, and notorious acts of Huey, to ascertain his agency." The defendant excepted to each of these charges, and requested the court to charge the jury: 1. "That the plaintiff must prove that Huey had express authority to borrow the money, and give the note of the company therefor; or that after Huey had given this note, the company, with a full knowledge of all the facts, had ratified the act. This ratification can only be binding on the company, when it is shown that it was made with a knowledge of all the facts. 3. But proof that the company authorized the borrowing of money, once from a bank in South Carolina, and once from Alexander Bowie, as administrator of Davis' estate, is not sufficient to authorize the inference. 4. It was the duty of plaintiff to ascertain the extent of Huey's authority to borrow money for the company, and give the note sued on, before he made the loan, and the law did not permit him to omit doing this." The court gave this charge, with the following oral addition, or qualification, viz: "Unless the jury are satisfied, from the evidence, that, at the time the note was given, Huey was the general agent of the company." 5. That Huey, as secretary of the company, had no authority, by virtue of his office, to borrow money for the company, or in its name, and to pledge its responsibility for the payment of the money, and the note sued on is not binding on the company, unless said Huey, as secretary, was authorized, by a resolution, or by

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law, of the directors of the company, to borrow money and make the note; that said note does not bind the company, unless it ratified the act of Huey, with full knowledge of all the facts and circumstances attending the borrowing of the money, and the execution of the note. 6. To authorize the jury to infer the authority of Huey, as secretary, to bind the defendant by the note sued on, by the conduct of the defendant, by the payment of debts, or recognizing liabilities entered into by Huey, as secretary, or made by him in the name of the company, it is necessary that the jury be satisfied, by the evidence, that the payment of such debts, or recognizing such liabilities, so created by said Huey, as secretary, or defendant, was known to the plaintiff, at or previous to the execution of the note sued on, and that said note was taken on the faith of such previous recognition of the acts of said Huey, as the secretary, as binding on the defendant. 7. That under the evidence before the jury, they can not, if they find for the plaintiff, compute interest on the note in suit. The court refused to give any of these charges, except the fourth, as stated above, and the defendant duly excepted. The defendant also excepted to the qualification or addition made by the court to the fourth charge. There was a verdict for the plaintiff for \$6,731.41. The errors assigned are, the rulings on the evidence, and the giving, and refusing to give, the charges as shown above.

PARSONS & PARSONS, and JOHN T. HEFLIN, for appellant. The corporation had power to borrow money and issue its bonds therefor. The instrument sued on is not a bond, but a promissory note, and the charter gives no authority for its execution. All officers not specially provided in the charter, were to be created by resolution of the board of directors, and as the secretary is not mentioned in the charter, the directors must, by resolution, have created one, and prescribed his duties. It was not denied that Huey was the secretary of the company, but appellant insists that he had no authority to bind it by signing said note, or to sign the corporate name to instruments in writing for borrowed money, or to have borrowed the money from appellee. No express authority to borrow McCullough's money is shown, and it appears that on two occasions the company borrowed money, but that each time it was authorized by a resolution of the directors. There was no evidence to show that McCullough ever heard, or knew, that the company borrowed the money spoken of by Bowie and Thomason, and he was not, therefore, induced to lend his money, because Huey, acting for the company, had been in the habit of bor-

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rowing money. The fact that a person acts as the agent of another, does not prove the agency. That must be proved by other evidence, before it can be assumed that the acts are binding on the principal.—*Scarborough v. Reynolds*, 12 Ala. 252; *McDougald v. Dawson*, 30 Ala. 553. If Huey had any authority to bind the defendant by executing the note, it must be found in the nature of his employment, for the charter gave him no power to do so, and there is no evidence that he was specially authorized to do so by the board of directors.—*Childress v. Miller*, 4 Ala. 447; *Skinner v. Gunn*, 9 Port. 305; *Spyker v. Spence*, 8 Ala. 333. The officers of a corporation are special, and not general agents, and can not bind it, except as authorized by its charter or by-laws. Persons dealing with them, are charged with notice of the extent of their authority.—*Adrian v. Roome*, 52 Barb. (N. Y.) 399; *Chicago R. R. Co. v. James*, 22 Wis. 194; *Blood v. Marcus*, 38 Cal. 409; *Culver v. Leavy*, 19 La. 202. The president (or secretary) of an incorporated company can not borrow money in the name of the company, and pledge its responsibility, unless authorized by the charter of the company to do so, or by a resolution or by-law of the directors.—*L. & F. Ins. Co. v. M. F. Ins. Co.* 7 Wend. 31; *Beach v. Fulton Bank*, 3 Wend. 573; 2 Cow. 432; *Ib.* 673.

One who deals with an agent, is bound, at his peril, to ascertain the extent of his authority.—*Gullett v. Lewis*, 3 Stew. 22; *Fisher v. Campbell*, 9 Port. 210; *VanEpps v. Smith*, 21 Ala. 317; *Powell v. Henry*, 27 Ala. 612; 43 Ala. 719. The court erred in not excluding the note sued on, and in not excluding the evidence.—43 Ala. 719. The plaintiff had no right to interest on the note from its date. It was payable one day after date. McCullough's evidence as to the loan of the money was hearsay, and should have been rejected. 16 Ala. 308; *Pearson et ux. v. Darrington*, 32 Ala. 229; 27 Ala. 458. The evidence that Huey was acting as general agent of the company, was the mere expression of opinion. The witness should have stated what Huey was doing, and have left the inference as to his agency to the jury.—1 Ala. 632; *Hatchett v. Gibson*, 13 Ala. 587; 34 Ala. 69. The other exceptions to the evidence were well taken, and should have been sustained.—3 Ala. 697; 11 Ala. 566; 23 Ala. 49; 30 Ala. 672. The court erred in adding a qualification to a written charge.—Code, § 3109; *Edgar v. State*, 43 Ala. 43. The charge was proper as requested, and should have been given.—11 Ala. 485; *Ib.* 1059; 4 Ala. 116; 50 Ala. 134.

WALDEN &amp; BISHOP, for appellee.



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BRICKELL, C. J.—The action was commenced, and the trial, verdict and judgment had, in the life-time of the intestate of the appellee. The cause of action is a promissory note, purporting to be made by the Talladega Insurance Company, payable to the intestate, in form and substance as follows: "\$3,673.31. April 6, 1863. One day after date, I promise to pay to the order of David McCullough, in American gold coin, thirty-six hundred and seventy-three dollars, at the office Talladega Insurance Company, for value received. (Signed) Talladega Insurance Company, by James G. L. Huey, Secretary."

Several pleas were filed, but the evidence introduced was directed particularly to the issue formed on a verified plea of *non est factum*. There are numerous exceptions (thirty-four in number) to the admission of evidence, and the instructions given, or refused to be given, the jury. With the exception of one instruction, which we will notice separately, there are but two questions involved. *First*, had the appellant power to borrow money, and for its payment, make a promissory note? *Second*, had Huey, as Secretary, authority to borrow money for the company, and make its note, as security therefor?

The company was created by a special act of incorporation, approved February 13, 1856; and was entitled "to all the privileges, and invested with all the powers, and subject to all the restrictions, as were conferred and imposed upon the Tuskegee Insurance Company," by the act incorporating that company, approved January 19, 1856.—Pamph. Acts, 1855-6, p. 261. The privileges and powers conferred on the Tuskegee Insurance Company, were the transaction of the business of fire, marine, and life insurance; receiving of moneys on deposit, the collection of promissory notes and bills of exchange, the lending of money, and the purchase, discount, and sale of such notes and bills. Express power to borrow money, and issue the bonds of the corporation therefor, was conferred.—Pamph. Acts, 1855-6, p. 249.

1. The proposition now insisted upon, is, that this is a limitation upon the power of the company, restraining and confining it to the issue of bonds, for the payment of money borrowed, excluding the power to make any other evidence of the debt, such as a bill of exchange, or a negotiable promissory note. When this cause was before this court, at a former term (*McCullough v. Talladega Ins. Co.* 46 Ala. 376), it was held, this proposition could not be maintained; and such in effect was the decision in *Talladega Ins. Co. v. Sanders*, 43 Ala. 115. We entertain no doubt these decisions are correct. It can not be matter of doubt, that every corporation

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clothed with the powers conferred on this company, has an incidental and implied power to borrow money, and in the exercise of the power, may make paper negotiable, or not negotiable, and give such securities as may be deemed most advantageous. The power, though it may not be expressly conferred, is implied and incidental, unless of it there is express prohibition.—*Ala. Gold Life Ins. Co. v. Central Ag. & Mech. Asso.* 54 Ala. 73; *Allen v. Montgomery R. R. Co.* 11 Ala. 454; *M. & C. R. R. Co. v. Talman*, 15 Ala. 491. The clause of the charter referred to, declaring the company could issue bonds for money borrowed, can not be construed as limiting it to the making of such securities, excluding the implied and incidental power to make other usual securities and evidences of debt. It was doubtless intended from mere abundance of caution, rather as an additional grant of power to issue corporate bonds, which though so styled, and under the corporate seal, it was intended, unlike the bonds of a natural person, should have the qualities, properties, and privileges of negotiable paper.—*Lucas v. Pitney*, 3 Dutch. (N. J.) 227; *Railroad Company v. Howard*, 7 Wall. 412.

2. The powers of the company could be exercised, its business transacted, only through the intervention of officers or agents; either such as are specially designated in its charter, or such as might be appointed by the proper authority, in pursuance of its express, or implied, or incidental powers. The charter provides that the governing body of the company, shall consist of a board of directors, of whom, one must be chosen president. The board is invested with full power in express terms, to appoint and remove at pleasure, all officers and agents of the company, and *to prescribe their duties*. It was doubtless intended that there would be written evidence of the appointment of all officers or agents, and of the duties assigned them, when their relation to the company was continuous, and their employment not casual and temporary. If there was such evidence of Huey's appointment as secretary, and of the duties he was in that capacity to perform, it was within the peculiar knowledge, and exclusive possession of the appellant; and if it would have availed any purpose in this controversy, ought to have been produced. The appellee was not bound to produce it, or account for its absence. And whatever of presumption can be drawn because of its absence, must be visited on the appellant, who has voluntarily assumed the attitude of neglecting or refusing to produce evidence, which was in its power and possession, if it exists.

The appointment of the officers or agents of a corporation, strangers can not be compelled to prove by written evidence.

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It may, or not, rest in writing; it may be inferred from the recognition, and continuous acquiescence by the corporation in the acts of such officers or agents.—*Ala. & Tenn. R. R. Co. v. Kidd*, 29 Ala. 221. Whether the note, the foundation of suit, should be introduced and read in evidence, before any evidence was given of Huey's agency, of his official relation to the company, or of his authority, was a matter largely of discretion with the plaintiff. It is but seldom necessary that the court can or ought to prescribe the order in which a party may introduce his evidence. When all the evidence is produced, if it is wholly insufficient to support the plaintiff's cause of action, or the grounds of defense, it is the duty of the court, on motion, to exclude it. Or, if any part of the evidence is then irrelevant, because of the failure to connect it with other evidence, it ought to be excluded, on motion.

The principal issue, as we have already said, was on the plea of *non est factum*. The burden of proof rested on the plaintiff to show, not only that Huey was secretary of the company, but that as such he had authority to borrow money for the company. When evidence was introduced tending to show these facts, the note was admissible, and the evidence, however weak or slight it may have appeared to the court, could not be excluded from the jury. There was no disputation of the fact, that through a period of six or seven years, from the time the company organized, until there was a suspension of active business, Huey was its secretary. The duty and power with which he was clothed, is to be inferred from his acts in that capacity, which were known to, and acquiesced in, by the company. It is true, as a general rule, that agency must be proved otherwise than by the mere acts of the agent, before it can be assumed that such acts are binding on the principal. And it may also be true, that as a general rule, the mere acts of the assumed agent, unaccompanied by any evidence tending to show that the principal had knowledge of, or assented thereto, are not even competent evidence to be submitted to the jury upon the question of agency. But, when there is any evidence tending to show the assent of the principal to the acts of the agent, these acts, in connection with such evidence of the principal's assent thereto, must go to the jury, and if the acts of the supposed agent are of such a nature and so continuous in their character, as to furnish in themselves, any reasonable ground of inference that they were known to the principal, and that in the absence of authority to the agent, he would not have suffered them, the acts are competent evidence to be submitted to the jury.—*Gimon v. Terrell*, 38 Ala. 208; *McDonnell v. Br. Bank Montgomery*, 20 Ala. 313; *Krebs v. O'Grady*, 23 Ala. 716. Within these principles certainly



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falls much of the evidence the appellant moved to exclude from the jury. That Huey openly and notoriously transacted the general business of the company—that he had possession and care of the office in which the business was transacted—the custody of its books and papers, and of its funds, and that he had, on more than one occasion, borrowed money for it, and the money was on the books of the company entered to the credit of the lender, were all facts having a tendency to show his relationship to the company—the duty and authority pertaining to the relation, and their publicity, notoriety, and continuity, were, it may be, sufficient in the judgment of the jury, to fix knowledge of them upon the company, and to authorize the inference that in the absence of authority for them, they would not have been permitted. It is true, that whoever deals with an agent, if he intends holding the principal to liability, must inquire into the extent of the authority of the agent. Corporations select their own officers and agents; strangers have no voice in this selection, and if they deal with the corporation must transact business through its agents. For the acts of its agents, while engaged in its service and in the line of their authority and duty, a corporation is liable to the same extent as would be an individual under like circumstances. When it holds out a particular officer, or suffers the officer to hold himself out, as having particular or general authority, inviting dealings with him, if loss must ensue, the corporation must bear it, and not those who have so far as was known, or could be seen by them, dealt with him in the line and scope of his duty and employment.—*Mer. Nat. Bank v. State Nat. Bank*, 10 Wall. 604. There is no reason to suppose that Huey, in the original borrowing of the money of the plaintiff in 1860, or in the subsequent renewal of the promissory note for it in 1863, was guilty of any infidelity to the company. No fact was shown from which it could be inferred that he appropriated the money to his own, and not to the use of the company. The defense was rested wholly on the weakness or insufficiency of the evidence introduced by the appellant to show Huey's agency and authority. If, however, there had been evidence tracing deceit to Huey in the transaction, it would not have been available, if the evidence satisfied the jury that the company had, by its mode of transacting business, its recognition and acquiescence in his acts, held him out to the public as its chief, or only executive officer, clothed with general powers to transact its business. When, as was said by Lord Holt, in *Hun v. Nichols*, 1 Salk. 289: "Seeing somebody must be a loser by this deceit, it is more reasonable that he

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that employs, and puts trust and confidence in the deceiver, should be a loser, than a stranger."

The opinion of a witness, or a conclusion drawn by him from facts, as a general rule, is not admissible evidence. We do not think the statement of the witness that he regarded Huey as the general agent of the company, falls within this rule of exclusion. If it stood alone, disconnected from the evidence given previously and subsequently by the witness, it might be objectionable. When considered in connection with that evidence, it is a statement in a guarded form of the fact that Huey was the general agent of the company, accompanied by a statement of the witness' means and sources of knowledge of the fact.—*McGrew v. Walker*, 17 Ala. 824.

Nor was the statement of the plaintiff, that the money was loaned originally in 1860, through his agent, and renewed annually until 1863, objectionable as hearsay. The only indication that the knowledge of the witness was derived from hearsay, was the subsequent statement that in the meanwhile he had been in Texas. This may have been true, and he may have had direct personal knowledge of the loan, and its renewals. If his knowledge was derived wholly from hearsay, it could easily have been shown by a cross-examination on the point, to which he was not subjected.

In passing upon the admissibility of evidence, we have passed on the several instructions given the jury (with one exception), to which the appellant reserved exceptions. It is not necessary to review them; they are in substantial conformity to the views we have expressed. The first instruction requested was erroneous, if for no other reason, because it asserted that the plaintiff must show Huey had express authority to borrow money for the company. The authority could be implied from his relation to the company, the nature of his employment, the mode in which he was permitted to conduct its business, and his borrowing on other occasions.

There was no question in this case growing out of a ratification by the company of any unauthorized act of Huey's as secretary. For it must be borne in mind that if his authority was defined and declared, the appellant had the means of proving it, but neglected to avail themselves of it. The former acts of borrowing and the acquiescence of the company in them, were introduced for the purpose of showing the extent of his authority, and not that the company had, in any instance, ratified his unauthorized acts. The second and third charges requested, if there had been any question of ratification involved, may, or not, have been correct. In view of the evidence, they were abstract and misleading.

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There was no error in the addition made by the court to the fourth instruction requested. The fifth and sixth instructions were properly refused, according to the views we have expressed.

3. All contracts for the payment of money, bear interest from the day the money is payable.—Code of 1876, § 2089. The court erred in the instruction that interest must be computed from the day of the date of the note, instead of the succeeding day, when it was payable. The error was inadvertent, and would have been cured if the appellant had called attention to it, and asked an instruction that interest should be computed from the day the note was payable. But instead of this, attention was directed from it, by the request of an erroneous instruction, that no interest could be computed or allowed. We are not of opinion, under these circumstances, the error, of itself almost insignificant, should avail to reverse the judgment.

Affirmed.

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### *Action on Promissory Note ; plea, statute of non-claim.*

1. *Statute of non-claim ; how presentation made to prevent bar of.*—Claims against the estates of deceased persons, may, to prevent the bar of the statute of non-claim, be presented in three different modes, viz : 1. By presenting the claim, or an accurate description of it, to the personal representative, in person. 2. By filing a statement of the claim, within eighteen months after the grant of letters, or after the accrual of the claim, in the office of the judge of probate of the county in which the letters were granted. 3. By filing the claim itself, within that period, in the office of the judge of probate.

2. *Claims against the estates of deceased persons must be docketed.*—If the claim, or a statement of it, is filed in the office of the judge of probate, the statute, (Code, §§ 876, 2599), requires such claim or statement to be docketed, and if demanded a statement must be given by the judge showing the time of presentation.

3. *Claim, statement of ; filing of, is act of creditor.*—If, instead of filing the claim itself, the creditor files a statement of it, this is his act and not that of the judge of probate, or of any ministerial officer, charged with the duty of making the statement.

4. *Statement of claim ; what it must contain.*—The statement need not observe the certainty of description essential in pleading, but it must of itself inform the personal representative, on inspecting it, of the nature, character, and amount of the liability it imposes, and must distinguish it with reasonable certainty from all similar claims.

5. *Statement of claim, in this case, held insufficient.*—A statement written in the "claim book," in the office of the judge of probate, by him, for a creditor holding a promissory note, that "F. claims as security. July 20, 1865, \$545," does not inform the personal representative that the claim is a promissory



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note made by the deceased, nor its amount, nor its date, nor to whom payable, or when due, is too vague and indefinite, and is not such a presentation of the claim, as will operate to prevent the bar of the statute of non-claim.

6. *Non-claim, bar of statute of ; prevented by filing the claim, although not docketed.*—When the creditor files the claim itself, its subsequent docketing is the duty of the probate judge, and his omission or neglect of that duty, cannot be invoked to the prejudice of the creditor, and the presentation is sufficient to prevent the bar of the statute of non-claim.

7. *Claim or statement must remain on file during the whole period of eighteen months.*—The claim, or a proper statement of it, must remain on file during the whole of the eighteen months, and if the creditor, after filing the claim itself, should, without leaving such a statement in the office of the probate judge, withdraw it, and not restore it within eighteen months, this would operate as an abandonment of the presentation.

8. *Suit operates as a presentment.*—The commencement of a suit within the statutory period, and its continued prosecution, operates as a presentation of the claim on which it is founded.

9. *Void and voidable letters of administration, distinction as to acts done under authority of.*—Whatever is done under the authority of letters of administration, which are void, *ab initio*, is without validity, but whatever is rightfully done, before revocation, under letters which are merely voidable, is as valid as if the grant itself were rightful.

10. *Presentment of claims to administrator when administration voidable, is sufficient.*—A grant of letters of administration, as in cases of intestacy, when the deceased left a will, which had not been admitted to probate, is voidable, and not void, and creditors may safely deal with such administrator and make presentment to him, of claims against the estate, and presentation to him, is operative against the executor after the grant of letters testamentary, and saves the bar of the statute of non-claim.

11. *Repeated presentments not required.*—The statute does not require repeated, or renewed presentments, as often as there may be changes in the administration.

### APPEAL from Barbour Circuit Court.

Tried before JAMES M. BUFORD, Esq., an attorney of the court, sitting and presiding in the case by consent of the parties, the presiding judge of the court being the party defendant.

This suit was brought October 5, 1868, by Page Floyd against Henry D. Clayton, as executor of the will of Richard H. Fryer, deceased, and was founded on a promissory note made by said Fryer, and one Fenn (who was not sued in this action), on January 1, 1858, for five hundred and forty dollars, and on which there had been made a payment of two hundred dollars. The note was payable to Collins, and is, the complaint avers, the property of the plaintiff. The defendant pleaded "in short, by consent," the statute of non-claim.

Richard H. Fryer died in 1864, and Lucinda Fryer, his widow, took out letters of administration on his estate on June 14, 1864. She continued to act as administratrix until August 23, 1866, when she made a final settlement of her administration, and turned the property of the estate over to H. D. Clayton, who had taken out letters testamentary, as the executor of the will of R. H. Fryer on July 18, 1866, in the probate court of Barbour county. This will had been in

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the possession of said Lucinda Fryer, during all the time she acted as administratrix, but owing to conflicting advice of counsel as to its validity, it was not probated until July, 1866. The plaintiff read the note in evidence, and then introduced the "claim book," which was kept in the office of the judge of probate, and which was admitted to be the book in which claims against the estates of deceased persons, which were presented to be filed in the office of the judge of probate, were stated. In this book was the following entry: "Richard H. Fryer est. Page Floyd claims as security July 20, 1865 \$545." The plaintiff testified that before said Fenn died he became the owner of the note, and presented it to Fryer for payment; that after Fryer's death, on July 20th, 1865, he went to the office of the judge of probate of Barbour county, and gave the said note to the judge of probate, who took it and made the entry on the claim book, which is set out above. He left the note with the judge of probate until he called and took it from the office, about August 10, 1867, and returned it there about August 18, 1867, and requested the judge of probate to hand it to a lawyer to bring suit on it. The plaintiff asked the court to give the following written charge to the jury. "If the jury believe the evidence they must find for the plaintiff for the principal and interest, less the payment on the note in evidence." This charge the court refused to give, and the defendant excepted. The defendant asked the court in writing to charge the jury, "that the statement of the claim, as shown by the docket on the book of claims, does not describe the note with sufficient accuracy to avoid the bar of the statute of non-claim. 2. If the jury believe the evidence, they must find for the defendant. The court gave these charges, and the plaintiff duly excepted. There was a verdict for the defendant. The errors assigned are, the giving and the refusal of the charges.

. JOHN A. FOSTER, for the appellant.—The letters of administration granted to Mrs. Floyd were not void, but were valid until revoked by the probate court.—*Coltart v. Allen*, 40 Ala. 155; *Curtis v. Williams*, 12 Ala. 570. The presentation to her was sufficient.—Code 1876 §§ 2597–8–9. It was not necessary to present it again to the executor who succeeded her. *Love's Adm'r v. Jones*, 15 Ala. 545; *Pipkin v. Hewlett*, 11 Ala. 291. The note was in the office of the judge of probate for eighteen months after the grant of letters to appellee, and as the note was on file, he had ample opportunity for inquiry as to the nature of the claim. The appellant did all he could to comply with the statute requiring presentment, and the failure of the judge of probate to docket the claim properly, can

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not be charged against him. There was no statement of the claim filed in this case, but the claim itself was handed to the judge of probate, by the creditor, and was filed with him, and hence the case of *Halfman v. Halfman*, 51 Ala. 546, has no application. Strict accuracy is not required in the docketing of these claims, but this is a mere memorandum for the purpose of directing the representative, or others, to the files for information as to the claims.

D. M. SEALS, for appellee.—The statement on the claim-book was vague and insufficient. It did not inform the personal representative of the nature of the claim, nor did it give the name of the maker of the note, nor state when it became due. It was not a compliance with the statute, and did not prevent the operation of the statute of non-claim. Nor did this statement give the executor any notice that the claim had been left with the judge of probate. The statute requires such claims to be docketed, and this is the evidence that they have been filed. The executor had no notice of any valid claim against the estate. Handing a conveyance to the judge of probate does not cure his failure to record it correctly.—*Jones v. Park*, 22 Ala. 446; 19 Ala. 365. The claim was barred by the statute of non-claim, and the court committed no error in the charge given at the request of the defendant.

BRICKELL, C. J.—The presentation of a claim against the estate of a deceased person, to prevent the bar of the statute of non-claim, may be made in three different modes: 1. The presentment of the claim, or of an accurate description thereof, may be made to the executor or administrator in person. 2. Within eighteen months after the grant of administration, or after the accrual of the claim, a statement of the claim may be filed by the creditor or claimant in the office of the judge of probate, in which letters testamentary, or of administration, were granted. 3. The claim itself may, within that period, be filed in the office of the judge of probate. If either of the latter modes of presentment is adopted the statute requires the statement, or the claim to be docketed, with a note of the time of such presentation, and if required, a statement must be given by the judge, showing the time of presentation.—Code of 1876, § 2599. If, instead of filing the claim itself, a statement thereof is filed, the making of such statement is the act of the creditor or of the claimant, and not of the judge of probate, or of any ministerial officer, charged with the duty of making the statement. The statute simply gives to the creditor or



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claimant the privilege of substituting for a presentation to the personal representative, in person, or the filing of the claim itself, the filing a statement of the claim. The statement filed by the creditor or claimant, must not be so indefinite and uncertain, that on inquiry by the personal representative at the office of the judge of probate, and on examination of it, he could not ascertain the real character of the claim, and whether it imparts a claim for which the estate of the decedent was liable. Technical accuracy, the certainty of description essential in pleading, may not be observed, but the statement must, of itself, inform the personal representative, on an inspection of it, of the nature, character, and amount of the liability it imports, and must distinguish it with reasonable certainty from all similar claims.—*Hullett v. Br. Bank Mobile*, 12 Ala. 193; *Posey v. Decatur Bank*, *Id.* 802; *Halfman v. Ellison*, 51 Ala. 543; *Bibb & Falkner v. Mitchell*, 58 Ala. 657.

The docketing of this claim, the entry on the docket, or register of claims, by the probate judge, tested by the rule stated, is too vague and indefinite. It would not impart to the personal representative information that the claim intended was a promissory note made by the decedent in his life, or of its amount, or time of payment, or to whom payable, so that direction would be given to his inquiries into its validity and justness. And if this were the only presentment, and was the act of the party, it would not save the bar of the statute of non-claim. But that entry was the act of the probate judge, and not of the creditor. The creditor discharging a duty incumbent on him, filed the note, the claim itself, and not a statement of it, as a presentment. The docketing of the claim, was the duty and act of the probate judge, to be performed after the creditor had filed the note. The rule of law, founded in necessity, and of general application, is, that when a party discharges a duty imposed by law, the omission or neglect of a public officer, in the discharge of a subsequent duty, shall not be invoked to his prejudice.—*Halfman v. Ellison*, *supra*. The filing of the note, notwithstanding the vague and indefinite entry of it, on the docket of claims, operated as a presentation on the day of its filing. The personal representative ought not to have looked alone to that entry. Imperfect as it is, it ought to have put him on the inquiry, and inquiry would have led him to the knowledge that the note itself was filed, and not a statement of it.

When a statement of the claim, or the claim itself, is filed in the office of the judge of probate, the statute contemplates that the one, or the other, must remain of file. During the

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whole of the eighteen months, the personal representative has the right of examining the office of the judge of probate for claims. And even after that period has elapsed, it is important for him to know the claims which have been presented. He cannot, without such knowledge, proceed safely in the administration. If, therefore, the creditor, after filing the claim itself, should, within the eighteen months, withdraw it from the files, and not within that period restore it, leaving there no sufficient statement or memorandum of the claim, it would operate an abandonment of the presentation. The commencement of a suit within the statutory period, and its continued prosecution, operates as a presentment of the claim on which the suit is founded.—*Hunley v. Shuford*, 11 Ala. 203. But if the suit is voluntarily abandoned, it will not operate a presentment.—*Bigger v. Hutchings*, 2 Stew. 445; *Dilbore v. Moorer*, 14 Ala. 426; *Pipkin v. Hewlett*, 17 Ala. 291. The presentment would deceive and mislead the personal representative, if the creditor was allowed to withdraw the claim from the files, leaving no statement or memorandum, informing the personal representative of the fact of presentment, and of the nature and character of the claim, upon which there could be reliance and action. If there be a necessity for the withdrawal, the creditor has but to supply its place, by placing, in lieu of the claim, a sufficient statement of it on the files. Though the note was filed, if it was withdrawn within the eighteen months by the creditor, and not within that period restored to the files, and no other memorandum or statement left, than the vague, indefinite entry found on the docket, there was not a presentment which would avoid the bar of the statute.

There is a manifest distinction between grants of administration which are void, *ab initio*, and grants which are voidable and revocable. In the first case, whatever may be done under the grant, is without validity. In the other, whatever is rightfully done before revocation, is of the same validity as if the grant was rightful.—1 Williams Ex'rs, 517, *et seq.* A grant of administration, as in case of intestacy, when the deceased left a will, which had not been admitted to probate, is voidable, not void.—*Jennings v. Moses*, 38 Ala. 402. Acts in which third persons have an interest, done by the representative under a voidable grant, are, generally, valid, and bind the executor.—*Kittredge v. Falum*, 8 N. H. 98; *Bigelow v. Bigelow*, 4 Ohio, (Hamm.) 138; appeal of Robert Peebles 15 Serg. & Rawles, 39; *Benson v. Price*, 2 Nott & McC. 577; *Foster v. Brown*, 1 Bailey, 221; *Price v. Nesbit*, 1 Hill Ch. 461. The creditor here, had no knowledge of the existence of the will; he was never put on enquiry, whether the de-

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cedent died testate, or intestate. Upon the records of the court of probate, as to the grant of administration, a court of general jurisdiction, its judgments imparting verity and jurisdiction, he found a grant of administration. Until that grant was revoked, he could safely deal with the administratrix as the rightful representative, and rely upon its validity. It was his right to make presentment of his claim to her, and the presentment is as operative against the executor subsequently taking probate of the will, and obtaining letters testamentary, as if the administration had been rightful, and he was a succeeding administrator *de bonis non*. From the administratrix the creditor could rightfully have received payment, and payment by her would have been an extinguishment of the demand as to the estate. Having the right to demand and receive from her payment, he had a corresponding right to make presentment to her, and the presentment saved the bar of the statute of non-claim, though it was not renewed to the executor. The statute does not contemplate renewed or repeated presentments, as often as there may be changes of the administration.

The rulings of the Circuit Court were not in conformity to these views, and its judgment is reversed, and the cause remanded.

## Trawick's Heirs v. Trawick's Adm'rs.

*Petition in Probate Court by Heirs to compel Administrators to make Final Settlement.*

1. *Judgment rendered by judge related to parties to suit; effect of.*—A judgment rendered by a judge, who is related to any of the parties to the suit within the fourth degree, is reversible, or voidable, but is not void, and can not be set aside, when collaterally assailed.

2. *Infants; chancery rule as to service of process on, does not apply to probate courts.*—While the rule in the courts of chancery requires personal service on infants, or some one for them, depending on the facts of the case, the rule is otherwise in the courts of probate, and a final settlement, made without personal service on the infant distributees, who were represented by a guardian *ad litem*, is valid.

3. *Probate court has no jurisdiction to vacate voidable decree after term at which it was rendered.*—When a voidable decree is rendered by the probate court, on final settlement of an estate, and no appeal from it has been prosecuted, all its provisions and terms become *res adjudicata*; and, after the term at which it was rendered, the probate court has no jurisdiction whatever to vacate the decree, or retry the question therein settled.



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APPEAL from Henry Probate Court.

Heard before Hon. J. W. FOSTER, Register in Chancery, the Probate Judge being disqualified to try the case.

On December 26, 1878, appellants, who are the children of F. D. Trawick, deceased, presented their petition to the judge of probate of Henry county, praying that G. N. and M. R. Trawick be cited to make a final settlement, as administrators of the estate of said F. D. Trawick. The petition alleged that said administrators made what purported to be a final settlement of said estate, on February 10, 1859, and that on June 10, 1870, their final settlement, and the decree rendered thereon, was vacated and annulled by said Probate Court, on petition filed by the appellants for that purpose. The administrators answered this petition, setting up the settlement made by them in 1859, and the decree rendered at that time. The petition on which the decree of 1870 was rendered, was based on the fact that the Probate Judge before whom the settlement was made, and by whom the decree was rendered, was related, within the fourth degree, to one of the administrators, and it averred that the proceedings and decree on said settlement were void. The record of the Probate Court, on the final settlement, does not show any personal service of process on the infant distributees, but the decree recites that the guardian *ad litem* (naming him) was notified, and was present *pendente lite*. The court dismissed the petition, and the decree is assigned as error.

J. WYATT OATES, and L. C. SMITH, for appellants.—The decree rendered by the Judge of Probate, who was related to the parties, was void. *Ellis v. Smith*, 42 Ala. 349; *Hine v. Hussey*, 45 Ala. 496; and *Hayes v. Collier*, 47 Ala. 726, are not correct expositions of the law, and should be overruled. Indeed, the very authorities cited in those cases show that judgments or decrees rendered by judges who are related to the parties, are void. In *Hine v. Hussey*, *supra*, the judge who delivered the opinion says, that the arguments are weighty, and the decisions abundant, to show that such decrees are void, but adds, that the purposes of justice will be best subserved by holding them to be voidable; thus overriding, by judicial construction, the intention of the legislature. The petition on which the decree of 1859 was vacated, gave the court jurisdiction of its subject matter.—2 Brick. Dig. 140, § 137. The court also had jurisdiction, by service of process on the administrators, and the judgment, or decree, vacating the decree of 1859 was *in personam*.—*Blund v. Bowie*, 53 Ala. 152. This latter judgment was properly rendered, and could not be collaterally assailed by appellees.

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*Pettus v. McClannahan*, 52 Ala. 55., That question is *res adjudicata*, and can not be again raised in this court.—Freeman on Judg. §§ 96 and 249; 2 Brick. Dig. 145, §§ 203–209. The decree of 1870 could not be set aside at a term subsequent to that at which it was rendered.—*Griffin v. Griffin*, 40 Ala. 296; *Watson v. Hutto*, 27 Ala. 573. This court will presume that the decree was properly rendered.—*Morgan v. Morgan*, 35 Ala. 303. The case being within the jurisdiction of the court, all reasonable intendments will be made to support the decree.—1 Brick. Dig. 156, § 406. The record does not show that any service of the petition for final settlement was made on the infants, and the court appointed a guardian *ad litem*, before it had jurisdiction of their persons. This service will not support a decree divesting infants of title. *Atkinson v. McIntosh*, 63 Ala. 241.

W. C. OATES, J. G. COWAN, J. A. CORBITT, and J. A. CLENDENNIN, for appellees.—The proceedings for final settlement, and the decree rendered thereon, in February, 1870, were, at most, only voidable.—*Hine v. Hussey*, *adm'r*, 45 Ala. 496; *Hayes et al. v. Collier*, 47 Ala. 726. At common law a decree rendered by a judge, who was disqualified to try the cause, did not render his judgment void.—*Dennis v. Grand Junction Canal Co.*, 16 Eng. L. and Eq. R. 63; *Heydenfeldt v. Towns et al.*, 27 Ala. 423. The statute of our State, or this State, must be construed in view of the common law, and is merely declarations of the common law. The decree of 1859 being only voidable, that of 1870, vacating it, was a nullity.—*Voorhees v. U. S. Bank*, 10 Peters, 449.

STONE, J.—It is settled in this State, that a judgment rendered by a judge, who is related to any of the parties in interest, within the fourth degree, is not, for that reason, void.—*Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726. Referring to these two decisions, BRICKELL, C. J., in *Plowman v. Henderson*, 59 Ala. 559, said: "If we had doubts, even grave, of the correctness of these decisions, we could not be justified in departing from them." Such decision, by a judge thus related, is reversible, or voidable; but can not be set aside on collateral assault.—Freeman on Judgments, section 145; *Heydenfeldt v. Towns*, 27 Ala. 423.

It is objected, in argument, that when the settlement was made, in 1859, no personal service was perfected on the infant distributees. The rule in chancery requires personal service on the infant, or some one else for him, depending on the facts of the case.—Rule 23, Chancery Practice; *McIntosh v. Chambers*, 63 Ala. 241. The rule in the Probate

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Court is different.—*Stabler v. Cook*, 57 Ala. 22; *Hutton v. Williams*, 60 Ala. 107.

The decree of the Probate Court, on final settlement, in 1859, being only irregular, and not void, and no appeal from it being prosecuted, all its provisions and terms become *res adjudicata*; and, after the term at which it was rendered, the Probate Court had no jurisdiction whatever to vacate the decree, or retry the questions therein settled.—*Cunningham v. Thomas*, 59 Ala. 158; *Hutton v. Williams*, *supra*. If timely application had been made, it is probable a writ of prohibition would have lain to restrain the action of the Probate Judge, as being without his jurisdiction.—*Ex parte Carswell*, 60 Ala. 378.

The rulings of the Register, acting for the Judge of Probate, who was incompetent, are strictly in accordance with these views.

Affirmed.

## Ware et al. v. Curry.

### *Bill in Equity to Enforce Vendor's Lien on Land.*

1. *Misjoinder of defendants to bill; for whom available*.—One who is improperly joined as a defendant to a bill in equity, may take advantage of the misjoinder, but if he fails to appear and object, a demurrer on that ground, by his co-defendants, will not be sustained.

2. *Multifarious; what averments do not render bill multifarious*.—In determining whether or not a bill is multifarious, its object, averments, and prayer, must all be considered; and if it has a single object, to which alone the prayer is directed, it is not rendered multifarious by averments that are impertinent, or which merely seek to negative an anticipated defense.

3. *Contract; test of right to enforce when impeached as illegal*.—When the plaintiff requires the aid of an illegal transaction to support his contract, which is impeached as illegal, it is incapable of enforcement, but if he have rights originating in a transaction not offensive to law, and a right of recovery independent of an illegal transaction, although he may have participated in it, such transaction can not be employed to defeat his suit.

4. *Contract; this test of right to enforce applied in this case*.—A vendor of lands who retained the legal title, but who afterwards voluntarily executed a deed to his vendee, to enable the latter to consummate a contract for the manufacture of iron for the Confederate States, during the war, has a right, springing out of the original contract of sale, to enforce his lien on the lands for the purchase-money.

5. *Statutes of limitation; their operation and effect*.—Statutes of limitation do not annul contracts, or extinguish debts, they only bar such remedies as are specified in them; and where there are several remedies, to which a person seeking to enforce a contract, or collect a debt, may resort, the statute may bar one remedy, without affecting the right to resort to another.

6. *Liens; operation of statutes of limitation on*.—All liens for the payment of debts are in the nature of collateral securities, and may be given without affect-



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ing the right of the debtor to rely on the statutes of limitation, as a bar to an action in which a personal judgment would be rendered against him, on the debt, operating on all his property.

7. *Same; same.*—The corresponding principle, that liens are preserved, although the remedy on the debt may be barred by the statute of limitations, prevails both in courts of law, and in courts of equity.

8. *Vendor's lien; may be enforced, although remedy on purchase-money, note barred.*—A vendor of land, whether he retains or has parted with the legal title, may enforce his equitable lien for the unpaid purchase-money, although an action on the note or debt is barred by the statutes of limitation.

9. *Same; how far vendee is protected on bill to enforce.*—When the vendee, in good faith, and without notice of the vendor's lien, has entered into possession of the land, and made valuable improvements thereon, he will be allowed compensation for them, and for partial payments made before notice, and the land will be charged with the lien for the balance of the purchase-money, after deducting such payments, and the value of such improvements.

10. *Same; this rule applied to facts of this case.*—A corporation, having purchased land in good faith, and entered into possession, without notice of the vendor's lien for unpaid purchase-money, and having agreed to pay for it in the shares of its capital stock, will be allowed compensation for valuable improvements, although it has not delivered the stock nor received a deed, but will be compelled to answer to the vendor, for so much of the stock as will correspond to the extent of his lien on the land.

### APPEAL from Talladega Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity, filed on the 15th of September, 1878, by Jas. A. Curry, against Horace Ware, Samuel Clabaugh, the Alabama Iron Company, and S. J. Glidden. The bill states, that on the 13th of September, 1862, James A. Curry and Samuel Clabaugh formed a partnership for the purpose of manufacturing iron; that they purchased a large body of lands which are described in the bill, and erected such buildings, and put up such machinery thereon, as was necessary for the manufacture of iron; that the land contained large quantities of iron ore, and that "pig iron" was in great demand; that it was necessary to employ many laborers in the work, and to buy tools, and mules, and oxen, to carry on the business; that, on the 11th of October, 1863, complainant, Curry, entered into a contract, by which he sold to Clabaugh his half interest in the iron works, and the property described in the bill, for \$100,000, fifty thousand dollars to be paid before the completion of the contract, and fifty thousand dollars to be paid in four equal installments, of \$12,500 each; that the assets of the firm should be equally divided, and the debts paid jointly; that Clabaugh executed his notes, one for \$50,000 then due, and four others for \$12,500 each, due on the first day of April, July, and October, 1864, and on the first day of January, 1865; that the note for \$50,000 was taken up about the 18th of December, 1863, and another one given in lieu of it, on that day, for \$50,000; that on this note, Clabaugh had paid complainant two mules, at the agreed price of one thousand dollars each, which was

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credited thereon December 7, 1864, and that this was all Clabaugh had ever paid complainant on said purchase-money notes. In February, 1864, Clabaugh stated to complainant that it was necessary for him to have a title to the land, to raise money to carry on the business, and to pay the purchase-money; that he hoped to make a contract with the Confederate government for iron, on which he would obtain a large advance, if he could make a satisfactory showing as to his title to the property, and thereby be enabled to pay his note for \$50,000, or a large part of it; that thereupon, complainant, on Feb. 12th, 1864, executed a warranty deed to Clabaugh, conveying his half interest in said lands in consideration of one dollar; that the true consideration of this deed was the \$100,000 to be paid as above stated; that the hope that Clabaugh could raise money by its execution was merely an inducement to its execution; that complainant retained his purchase-money notes, and Clabaugh retained the contract of Oct. 11th, 1863, which was signed in duplicate; that Clabaugh made no contract with the Confederate government, or any of its agents, and that if he endeavored to make such a contract complainant knew nothing of it, and was in no way a party to it, and that Clabaugh never paid complainant any Confederate money on account of said purchase; that if Clabaugh had made any efforts to obtain a contract to manufacture iron for the Confederate States, or had seen any agent of that government, with that view, at the time said deed was executed, he had carefully concealed the fact from the complainant; that Clabaugh had exclusive possession of the iron works from Oct. 11th, 1863, to April, 1865, "when everything combustible, which could be found about the works, was burned down by the Federal troops, under the command of General Croxton;" that on Jan. 28, 1865, complainant demanded of Clabaugh a rescission of the contract of Oct. 11, 1863, because the latter had never complied with its terms by the payment of even the first note of \$50,000, and Clabaugh gave the complainant a written acknowledgment that he had never complied with the contract, and had not paid the first note, and stated in the acknowledgment that the deed was executed to enable him to raise money by completing a contract with the Confederate government; that complainant, with the exception of a very small amount, furnished the money to buy all the land and personal property mentioned in the bill; that complainant had paid about \$6,946 of the debts of Clabaugh and Curry, under the terms of the contract of Oct. 11th, 1863, but that said Clabaugh had not paid any of the debts of said firm, except as lumber was shipped to Richey and credited

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as is hereafter shown; that complainant had never received any of the assets of said firm; that he would have received payment of said notes in Confederate treasury-notes, which was the only currency in circulation when the contract was made, and when the last note became due; that Clabaugh entered into an arrangement with one Richey, by which they were to take possession of the steam engine at the works, the only available thing left after the burning by Gen. Croxton, and put up a saw mill for the purpose of sawing the pine timber on the lands, and shipping it; that complainant heard of this in January, 1866, and forbade Clabaugh to cut and saw the timber, and the latter then called on him to know how much lumber he would take for his interest in the lands, to which complainant replied, "that he would take six hundred thousand feet, if delivered promptly." Clabaugh refused to give this amount, but some time afterwards Richey proposed to give complainant his (Richey's) obligation for 600,000 feet of lumber, to be delivered within a specified time, for the purchase-money notes made by Clabaugh. Complainant made no contract with Richey to this effect, but, on the latter's stating that he had a contract with Clabaugh to run the mill for twelve months, provided complainant would allow him to do so, and that if he failed to give security on the obligation to deliver the lumber on his purchase of Clabaugh's notes, he would ship lumber on Clabaugh's account as fast as he could, complainant consented that Richey might run the mill under his contract with Clabaugh, but Richey did not send him any written obligation, as he had proposed, but he did ship lumber to complainant, and the latter applied it to the payment of Clabaugh's part of the debts of the firm of Clabaugh & Curry. Complainant also advanced money to Richey to buy food for his laborers, and materials with which to run the mill, so that after deducting this amount from the value of the lumber shipped by him, Richey still owed the complainant a large sum of money. Clabaugh afterwards demanded of complainant his notes, claiming that they had been paid by the delivery of the lumber shipped by Richey. In 1867, Clabaugh being still in possession of the property and engaged in cutting and sawing the timber, retaining the deed of February, 1864, claimed the purchase-money notes, and complainant delivered them to him, as he stated to Clabaugh at the time, not because they had been paid, but because, as complainant thought, the sale had been rescinded by the acknowledgment given him by Clabaugh that the terms of the contract had not been complied with. The bill then states that Horace Ware, a brother-in-law of Clabaugh, held the latter's note for \$8,414.12, which



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was dated July 1, 1862, and due one day after date ; that on December 13, 1869, Clabaugh and Ware entered into a contract by which the former sold to Ware, "his entire lime, or mill property, being 410 acres of land, &c., and when satisfactory titles are made, said Ware is to give up to said Clabaugh, notes on him to the amount of \$15,000 and pay him \$8,000 cash ;" that, under this contract, Ware was to have the mill, free of rent, until December, 1869. The bill avers that Ware had full notice that the purchase-money of the land was unpaid, and that Clabaugh was insolvent, though, in truth, the amount of his indebtedness to Ware was not very great ; that complainant had informed Ware, in 1869, that the purchase-money was unpaid ; that both Ware and Clabaugh knew of the existence of liens on the property, and it was agreed between them, that Ware should use so much of the cash payment of \$8,000 as would be necessary to buy up these incumbrances, and this Ware did, but complainant was not informed of this secret understanding until July, 1878 ; that Ware held five notes which were all made by Clabaugh during the war, and were, with one exception, payable then. One of these notes shows that it was given for sugar at \$4 per pound, another for scrap iron at 50 cents per pound, and another for "20 kettles at \$1,412.75 ;" that all of this indebtedness was of this character ; that Ware paid off with the \$8,000 cash payment, certain judgments and incumbrances which are set out and described in the bill ; that complainant's interest in the realty sold by him to Clabaugh was worth about \$95,000, and his interest in the personal property, was worth about \$5,000. The bill then shows that about the 2nd day of November, 1872, Horace Ware entered into a contract, in writing, with the Alabama Iron Company, a domestic corporation, which was signed by Horace Ware, and S. J. Glidden, for himself, and said corporation, by which said Ware bound himself, in consideration of \$20,000 of the paid up capital stock in said iron company, to convey to said company by warranty deed the lands described in the bill. The capital stock of the company was fixed at \$80,000, and it went into possession of the lands immediately after the contract was made with Ware, and erected a blast furnace for the manufacture of iron, and has made valuable improvements thereon ; that Ware has never conveyed the lands to the company, nor has the company issued to Ware the certificates of its capital stock. The bill disclaims any intention of interfering with any right of the iron company, and avers that Ware had studiously concealed all these facts from its president, Glidden ; that, under the agreement between Ware and the iron company, the lands are represented by the

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shares of stock, and Ware is still the owner of the lands, and so far as their liability for the unpaid purchase-money is concerned, the land and said stock are one and the same; that complainant has notified said company, through its president, Glidden, of his lien for the purchase-money, and demanded that the stock should not be issued to Ware. The bill makes Clabaugh, Ware, the Alabama Iron Company, and Glidden, parties defendant, and prays "that a lien may be declared on the lands in favor of complainant to the extent of the value of his half interest in the lands and permanent improvements thereon, and the fixtures appertaining thereto, and on a half interest in said twenty thousand dollars of paid-up stock."

Clabaugh and Ware appeared and demurred to the bill, on the grounds stated in the opinion of the court, but Glidden did not appear, or put in any demurrer. The Chancellor rendered a decree overruling the demurrer, and this decree is assigned as error.

JOHN T. HEFLIN, for appellants.—The trust that is implied in equity, in favor of the vendor of lands after he has conveyed the legal title, is impressed by law with qualities essentially different from those of the direct trust in favor of the vendor, when he retains the legal title as a security for the purchase-money. The implied trust does not attach to the title, which is in the vendee, nor to the debt; it does not exist as a right until established by decree, and then only as an incident of the debt. The incidents of a debt can not, in equity, survive it and be invoked as a remedy to enforce its payment. This position is sustained in 1 Leading Cas. in Eq. (White & Tudor's notes), Part 1, 483 *et seq.* See, also, *Trotter v. Erwin*, 27 Miss. 772; in *Chapman v. Lee*, 64 Ala. 483; *Bizzell v. Nix*, 60 Ala. 281; *Flinn v. Barber*, 61 Ala. 530, and *Haddock v. Mahone*, 44 Ala. 90; the difference in the rights and remedies of the vendor before and after the conveyance of the legal title is not considered. An examination of the authorities cited in the case of *Chapman v. Lee*, *supra*, will show that they are not in conflict with the position here assumed by appellants. In none of them was the question raised as to the right of the vendor to enforce his lien, after conveyance of the legal title. The opinion in *Hightower v. Rigsby*, 56 Ala. 126, clearly recognizes the difference in the rights and remedies of the vendor, in the two classes of cases. This decision is in conflict with *Haddock v. Mahone*, *Bizzell v. Nix*, *Flinn v. Barber*, and *Chapman v. Lee*, *supra*, but is in harmony with *Driver v. Hudspeth*, 16 Ala. 348; *Relfe v. Relfe*, 34 Ala. 500; *Shorter v. Frazer*, MSS.; *Bankhead v.*

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*Owen*, 60 Ala. 464. The difference between the two classes of cases is determined by the well defined distinction between executed and executory contracts. The lien of the vendor to enforce the payment of the purchase-money, after the conveyance of the legal title, is barred by the same statute of limitations that bars the remedy at law for the collection of the debt. It was so held in *Linthicum v. Tapscott*, 28 Ark. 267; *Robertson v. Wood*, 15 Tex. 1; 27 Miss. 772; 32 Miss. 235; 48 Tex. 634; 7 Yerg. 9; *Harris v. Mills*, 21 Ill. 44; 52 Ill. 53; 61 Ill. 260; *Ib.* 270; 96 Ill. 450. The defense that a claim is stale is allowed when there is a want of reasonable diligence on the part of the complainant, in the commencement of the suit, or in pressing his claims. The averments of the bill, in this case, show that the claim set up by the appellee was stale.

GEO. S. WALDEN, on the same side.—In 1867, Clabaugh openly repudiated the trust and any holding which could be considered subordinate to the claim asserted by the appellee. The statute of limitations began to run against the vendor's lien as soon as this was done, and had effected a bar when the bill was filed.—*Relfe v. Relfe*, 34 Ala. 500; *Bizzell v. Nix*, 60 Ala. 281; *Boyd v. Beck*, 29 Ala. 716; *Byrd v. McDaniel*, 33 Ala. 27; *Shorter v. Frazer*, MSS. Appellee is barred of relief by the unlawful intent with which the conveyance of Feb. 12, 1864, was made.—*Ware v. Jones*, 61 Ala. 288. Appellee is estopped from asserting a lien on the land by the admissions in his bill, and the rules of law applicable to the vendor's lien, do not afford him any remedy against the stock of the Alabama Iron Company, to be issued to Ware, nor is he aided by the delay in issuing the stock, the certificate being only evidence of title.—*Bishop v. Snell*, 37 Ala. 90.

BOWDON & KNOX, for the Alabama Iron Co. and S. J. Glidden.—The bill shows that Clabaugh, and those claiming under him, have had adverse possession of the land for more than ten years, and the lien asserted by appellee is barred by that statute. The contract between Clabaugh and Curry was tainted with illegality, and complainant can not enforce the vendor's lien. The real purpose of the bill was to establish a lien on personal property, i. e. the shares of the capital stock in the Alabama Iron Company to be issued to Ware. This a court of equity can not do.

PARSONS & PARSONS, with whom was TAUL BRADFORD, for appellee.—As Glidden was personally bound on the contract with Ware there was no misjoinder.—*McMaken v. McMaken*,



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18 Ala. 576; *Woodward v. Wood*, 19 Ala. 216. The bill is not multifarious, for it does not seek an account of the partnership transactions of Clabaugh and Curry. The averments on that subject were intended to show that the purchase-money had not been paid, by the shipments of lumber by Richey. Curry was not aware when he sold the property to Clabaugh that the latter had been negotiating a contract to manufacture iron for use by the Confederate States in the prosecution of the war against the United States, and what was said some months afterwards can have no influence on the case; at most, it was only an unrealized hope, an unexecuted intention, which human laws do not and can not regulate. While the wrong exists only in thought, there exists a *locus penitentie*.—*Smith v. Browley*, 2 Doug. 696; *Thomas v. City of Richmond*, 12 Wall. 355; *Hananer v. Doane*, *Ib.* 349. Intention can not by retroaction avoid a lawful contract, which was made months before that intention was expressed. The vendor's intention that an article should be used in aid of the war, must always be connected with its actual use for that purpose, in order to render the contract illegal.—*Ware v. Jones*, 61 Ala. 288; *Milner v. Patton*, 49 Ala. 424; *Oxford Iron Co. v. Quinchett*, 44 Ala. 48; *Thedford v. McClintock*, 47 Ala. 64; *Lockart v. Horn*, 11 Wall. 580. The statute of limitations of ten years does not apply to bar the equity of the appellee to enforce the vendor's lien. The presumption of payment does not arise until twenty years have elapsed from the date of the conveyance, or sale. The equity of the bill is fully sustained by *Driver v. Hudspeth*, 16 Ala. 343; *Relfe v. Relfe*, 34 Ala. 500; *Mahone v. Haddock*, 44 Ala. 90; *Bizzell v. Nix*, 60 Ala. 281; *Flinn v. Barber*, 61 Ala. 530; *Hightower v. Rigsby*, 56 Ala. 126; *Story Eq. Jur.* 1219. Horace Ware was not a *bona fide* purchaser, for he had not paid the purchase-money of the land before he had notice of the vendor's lien. *Wells v. Morrow*, 28 Ala. 128; *Moore v. Clay*, 7 Ala. 747. Nor was the Alabama Iron Company a *bona fide* purchaser without notice. It has not paid any part of the purchase-money, and had full notice of appellee's claim.—*Wells v. Morrow*, 28 Ala. 128. The equity of the special prayer in the bill, to have the shares of the stock subjected to the payment of the purchase-money, was unanimously recognized in *Duffey v. Frenaye*, 5 S. & P. 247.—*Moore v. Clay*, 7 Ala. 742; *Reese v. Kirk*, 29 Ala. 410; *Frost v. Beekman*, 1 John. Chan. 288; 1 *Story's Eq. Jur.* 27-8.

BRICKELL, C. J.—The original bill is filed by the appellee to enforce a lien on lands for the payment of the purchase-money. There are numerous causes of demurrer

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assigned, but they are reducible really to five, which may be stated as follows, viz :

1. That Glidden is without interest in the subject-matter of the suit, and is, therefore, improperly joined as a defendant.

2. That the bill is multifarious, seeking an account and settlement of the partnership which had existed between the complainant, Curry, and the respondent, Clabaugh, and the enforcement of a lien on the lands for the payment of the individual notes given by Clabaugh to Curry for the purchase-money thereof.

3. That it is shown by the bill that the contract between Curry and Clabaugh, by which the former conveyed the lands to the latter, was illegal and void.

4. That the remedy to enforce the lien for the purchase-money of the lands is barred, because an action at law for the recovery of the purchase-money, as well as an action of ejectment for the recovery of the lands, is barred.

5. That the bill does not seek to subject the lands to the payment of the purchase-money, but the shares of the capital stock of the Alabama Iron Company, which the company had contracted to give Ware in the purchase of the lands.

We shall notice the causes of demurrer, in the order in which they have been stated.

1. It is unnecessary to consider whether Glidden is not so connected with the contract between Ware and the Alabama Iron Company, for the purchase-money of the lands, that he stands in something more than the relation of a mere agent, contracting for a disclosed principal, and would be consequently a proper, if not a necessary party to the bill. For, if he stands in the relation of a mere agent, who, within the scope of his authority, has contracted for, and has so contracted as to bind the principal, and is improperly joined as a defendant, the misjoinder is matter available to himself only for his dismissal from the suit, and is not matter of concern to his co-defendants, who can sustain no injury from it. No rule of equity pleading and practice is better settled, than that misjoinder of defendants, is an objection available only to the defendant improperly joined.—1 Brick. Dig. 753, § 1689. Glidden not having appeared or demurred, there is no merit in the demurrer of the appellants, his co-defendants, resting upon this ground.

2. The demurrer for multifariousness is founded in a misconception of the objects, averments, and prayer of the bill. These are all to be considered in determining whether a bill is multifarious.—*Carpenter v. Hall*, 18 Ala. 493. The bill has a single object, and to that alone is its prayer directed. The

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object is the enforcement of the lien on the lands for the purchase-money unpaid. The averments in reference to the partnership and the partnership transactions, were introduced, doubtless, for no other purpose than to show the relations existing between the complainant and Clabaugh, and to negative the anticipated defense, that payments on the purchase-money had been made by the shipments of lumber Richey made to Curry. Be this as it may, the prayer of the bill is only for the enforcement of the lien claimed on the lands, and these averments in reference to the partnership may be impertinent, but they do not render the bill multifarious.

3. Nor is there any merit in the objection, that the agreement under which Curry made the conveyance of the legal estate in the lands to Clabaugh, was illegal. The deed was made to enable Clabaugh to enter into an arrangement with the agents of the government of the Confederate States for the manufacture of iron, the parties expecting that thereby Clabaugh would be enabled to realize funds to pay the purchase-money. That arrangement was never perfected, and if it had been, it would not have affected the liability of Clabaugh to pay the purchase-money, nor lessened Curry's rights or remedies to enforce its payment. It is not from the agreement, purely voluntary on the part of Curry, by which the deed was executed, that Clabaugh became liable to pay the purchase-money, or that Curry became entitled to receive and demand it. The liability, and the right sprung from the contract of sale made some time prior to the execution of the deed, and not from the subsequent agreement when the deed was executed, Curry claims, and can derive no aid from this subsequent agreement in enforcing the lien a court of equity raises for the payment of the purchase-money. The test by which to ascertain whether a contract impeached as illegal, is capable of enforcement, is whether the plaintiff requires the aid of an illegal transaction to support his case. If he does not—if he has rights originating in a transaction, not offensive to law, and has a right of recovery independent of an illegal transaction, such transaction, though he may have participated in it, can not be employed to defeat him.—*McGehee v. Lindsay*, 6 Ala. 16; *Gunter v. Leckey*, 30 Ala. 591; *Walker v. Gregory*, 36 Ala. 180. This cause of demurrer was properly overruled.

4. The fourth ground of demurrer has been of frequent consideration in this court, and ought to be regarded as settled finally and conclusively, if repeated judicial decisions can put to rest any vexed question, giving peace and security to the community, which ought not to be moved or disturbed.



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As to liens operating as a security for the payment of the purchase-money of lands, this court has decided that the lien is preserved, though the statute of limitations has operated a bar to the recovery of the purchase-money as a debt, whether the contract of purchase was executed by a conveyance of the legal estate to the vendee, or was as to a conveyance of the legal estate executory, dependent upon the payment of the purchase-money. Between the two classes of cases, in the operation of this principle, that the lien or security remains, and can be enforced, though remedies for the recovery of the debt may be barred by statutes of limitation, there has been no distinction made, and there is no room or reason for a distinction, though the relation of the parties, and their rights and remedies, are essentially different. *Driver v. Hudspeth*, 16 Ala. 348; *Relfe v. Relfe*, 34 Ala. 500; *Bizzell v. Nix*, 60 Ala. 281; *Shorter v. Frazier*, MSS.; *Chapman v. Lee*, 64 Ala. 483. The difference between these two classes of cases we endeavored to point out and clearly define in *Bizzell v. Nix*, *supra*, and in *Bankhead v. Owen*, 60 Ala. 457. When the vendor retains in himself the title as a security for the payment of the purchase-money, as was the case in *Driver v. Hudspeth*, *supra*, *Relfe v. Relfe*, *supra*, and in legal effect, though contrary to the intention of the parties in *Shorter v. Frazier*, *supra*, he has an estate in the lands, and there is no substantial difference in relation, and in rights and remedies, between him and a vendor of lands who conveys to the vendee, and takes a cotemporaneous mortgage to secure the payment of the purchase-money. While a vendor who conveys the legal estate to the vendee, has no interest or estate in the lands, nothing but the lien for the security of the purchase-money, which a court of equity will raise and enforce so long as the debt for the purchase-money remains unpaid. When the reason of the principle now to be applied, is considered, it is obvious that there can not be the slightest difference in its application in these two classes of cases, nor in any case of a lien, a charge upon property for the security of a debt, whether it is express, created by the contract of the parties, or arising by implication of law.

There was formerly much discussion as to the nature, effect, and operation of statutes of limitation upon contracts falling within their influence; whether these statutes were, as in those statutes, borrowed from the statute of 21 James 1, ch. 16, in terms directed more particularly to the forms of action, which must have been pursued to enforce performance of the contract, or, as under our present statute, directed particularly to the character and evidence of the contract. It is now the received doctrine that the contract is not ex-

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tinguished, though statutes of limitation operate a bar to remedies for its enforcement. It remains, and of itself, will furnish a sufficient consideration for a new promise to perform it. The new promise is not regarded as a new contract; it operates merely to remove the bar created by the statute; and suits are instituted, not upon the promise, but upon the original contract.—*Childress v. Childress*, 1 Ala. 482; *Jones v. Jones*, 18 Ala. 248. Upon this principle, that statutes of limitation do not annul or extinguish contracts, but relate only to the remedy, rests the doctrine generally prevailing in the absence of a statute otherwise providing, that if the statute of the State in which suit is brought does not operate a bar, the statute of the State in which the contract was made, though it may have perfected a bar while the party sought to be charged was within its jurisdiction, cannot be invoked as a defense.—*Childress v. Childress*, *supra*; *Jones v. Jones*, *supra*. The statutes do not relate to the obligation of the contract, which has its inception in the origin of the contract, but to the remedies which may be pursued when the obligation has been broken. There may be several remedies, to either of which a party can resort when he is damaged by the breach of the contract. The statute may operate to bar the one, without affecting the right to pursue another. All liens for the payment of a debt, are in the nature of collateral securities. Such securities may be given without affecting the right of the debtor to rely on the statute of limitations as a bar to the action on the debt against him personally, in which a personal judgment would be rendered, operating on all his property, whether presently owned or the subject of future acquisition. A common example is, when a mortgage under seal is given as security for the payment of a promissory note, or other simple contract, the note is not taken without the statute—it remains a simple contract, and remedies for its enforcement must be pursued within six years.—Ang. on Lim. § 92; *Scott v. Ware*, 64 Ala. 174. A pawnor giving a pledge for the security of a debt, is not deprived of the benefit of the statute as a protection against an action on the debt.—Ang. on Lim. § 73.

The principle which preserves liens, notwithstanding statutes of limitation operate to bar remedies on the debt, corresponds precisely to the principle that the creation of such liens does not arrest or prevent the operation of the statute as to remedies upon the debt. That principle prevails alike in courts of law and equity. It is quite a mistake to suppose, as is insisted in the argument of appellant's counsel, that it is peculiar to courts of equity. Statutes of limitations operating only on remedies, not on the obligation of

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contracts, not working their extinguishment, proceeding on considerations of public policy, independent of the merits of particular cases, for no other remedies than such as are expressed in them. The remedy for a debt may be barred, but there may be no bar to a remedy for the enforcement of a security or lien, created either by the contract of the parties or by the act of the law. And when there is no such bar, courts of law, as well as courts of equity, enforce the lien or security, when enforcement lies within their jurisdiction, though the remedy for the debt is barred. The lien or security is an incident to the debt, and remains, accompanying the debt, so long as it is not paid.

The case of *Higgins v. Scott*, 2 Barn. & Ad. 413, was the case of a lien of an attorney, enforced by the court of King's Bench, though the debt was barred by the statute of limitations. The case of *Spears v. Hartly*, 3 Esp. 81, before Lord Eldon, while Chief Justice of the Court of Common Pleas, was referred to by counsel. It was an action of trover, brought in 1800, to recover certain merchandise, upon which the defendant, a wharfinger, claimed a lien for a balance of general account due in 1790. As actions for the recovery of this balance was limited to six years, it was contended he could not retain possession of the merchandise for its payment. But Lord Eldon held that as statutes of limitation related only to the remedy, not creating any presumption of the payment of the debt, the wharfinger, by virtue of his lien, could retain the goods until the debt was paid. In *Edwards on Factors*, § 76, speaking of the lien of factors, which is essentially a *legal*, as distinguishable from an *equitable* lien, the principle, as it prevails in reference to either lien, and in courts of law or of equity, is tersely stated: "The lien remains good, notwithstanding the debt has been barred by the statute of limitations. This is because the statute does not discharge the debt, but only bars the remedy by an action. The rule must be different where the statute is construed as simply raising a presumption of payment from the lapse of time."

The case of *Bank of Metropolis v. Guttschlik*, 14 Peters, 19, is another instance of the application of the principle in courts of law. Without the knowledge of the bank, a principal debtor had conveyed real estate in trust for the protection and indemnity of his indorser, against whom the bank obtained judgment, but suffered the statute of limitations to bar all remedies for its enforcement. Then being informed of the deed of trust, the bank procured a sale to be made by the trustee, became the purchaser, made a sale of the lands, and the action was against the purchaser for the recovery of



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the price. Of other grounds of defense, it was insisted the bank did not, under the sale by the trustee, acquire any title, because the statute of limitations having barred it of remedies against the indorser, the trusts of the deed for his protection had expired. The court answered, that though the statute had operated a bar, the claim was of full force, and protected by the trusts of the deed until it was paid. In the case of *Waltermire v. Westover*, 4 Kern. (14 N. Y.) 16, the question was very carefully considered in a court of law, and the opinion of Selden, J., is a very clear, full, and precise statement of the principle, and the reasons upon which it is founded. By the statute of New York, the judgment of a justice of the peace, if a transcript thereof is filed and docketed in the county clerk's office, becomes a lien on the real estate of the defendant. The statute of limitations bars an action on such judgment in six years from its rendition. It was held, that though an action on the judgment was barred under the latter statute, the lien created by the former statute was preserved and could be enforced until the lapse of time raised a presumption of payment. The distinction between a statute which discharges the debt, and one affecting only the remedy, is very clearly drawn. It was said: "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held, that this statute, which is in terms confined to the remedy by *action*, operates to annihilate the remedy by *execution*?" The statute is in derogation of a clear common law right. It does not operate according to the recent cases by producing any presumption of payment, but is a mere statutory bar, founded in principles of public policy. It would be contrary, therefore, to all just rules of construction to extend its operation beyond the fair and reasonable interpretation of its language. The reasoning which has so fully established that statutes of this sort act upon the remedy only and not upon the debt, equally proves that the operation of the statute in question here is confined to the particular remedy by *action*. Indeed, the statute could only be held to reach and subvert the remedy by *execution*, by holding that the debt itself is discharged, or by interpolating language not expressly or by any fair implication contained in the statute."—See, also, *Thayer v. Mann*, 19 Pick. 535; *Crain v. Pain*, 4 Cush. (Mass.) 483.

It is not insisted that the bill shows there has been any discharge, any payment of the purchase-money of the lands. The whole argument is, that as it is shown the purchase-money was due by simple contract for more than six years, during which there was no legal impediment to a suit at law for its

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recovery, the lien cannot be enforced. In other words, that as the statute of limitations operates a bar to an action for the recovery of the purchase-money, the right and remedy to enforce the equitable lien for its payment is also barred. It has not been, and cannot be insisted there is any provision of the statute prescribing the time within which remedies for the enforcement of liens must be pursued in courts of law, or of equity. To apply the statutes to such remedies would require more than an unwarranted interpretation of their terms; there must be an importation into them of causes of action, and of remedies, in reference to which the law-maker was silent. As to remedies for the enforcement of liens for the security of debts, whether the liens are created by the contract of parties, or like the lien of a vendor of lands, who has parted with the legal title, taking no independent security for the payment of the purchase-money, arising by implication of law, there is no statute of limitations. Remedies to enforce them are not barred until twenty years has elapsed, creating a presumption of payment.

It is urged that a different principle ought now to be adopted in courts of equity, as it is expressly declared by statute, that the statutes of limitation shall apply to suits in equity. But the mandate of the statute is fully satisfied, when statutes of limitation have in courts of equity, and in reference to suits in equity, precisely the same operation and effect they have in courts of law in reference to legal remedies. When, if the right was legal, capable of enforcement by a legal remedy, that remedy would not be barred; a corresponding remedy in equity, for the enforcement of a right cognizable only in equity, cannot be barred. We have considered this question much more fully than we would have deemed necessary or proper in view of the former decisions of this court, if it was not so apparent the principle and reason of those decisions was misapprehended and misunderstood. The principle and reason is, that remedies for the enforcement of liens or securities for the payment of a debt, are distinct from and independent of remedies at law or in equity founded on the debt only. The one may be barred by the statute of limitations directed against it, without affecting the remedy for the other, as to which the statute is silent. It is not material whether the right or lien is *legal* or *equitable*, *express* or *implied*. Numerous examples will readily suggest themselves to the professional mind. A mortgagee has three remedies which he may pursue concurrently, or at such intervals as he may elect. The debt may be by simple contract and barred within six years. It would not be supposed, if he suffered this bar to be created, that he was barred of an

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action of ejectment limited to ten years; or, if he suffered that bar to be created, that he was barred of a bill to foreclose, which all authorities agree may be prosecuted until twenty years has raised a presumption of payment of the mortgage debt. An attorney having a lien, has the right to an action at law for the recovery of the debt to which the lien is attached, at any time within three, or within six years, depending on whether the debt is or not an open account. It is matter of choice with him whether he will resort to the action, or rely on the lien; or he may, if diligent, pursue both. But that he suffers the action barred by the statute of limitations cannot in reason, or in justice, preclude an enforcement of the lien to which the statute does not apply. The equitable lien of a vendor for the payment of the purchase-money of lands, is frailer than that of a mortgagee. The vendor has no estate in the lands, and of course can resort to no remedy for their recovery. He has, however, two remedies; one by action for the recovery of the purchase-money, another by bill in equity to enforce the lien. Suppose he suffers the action barred by the statute of limitations, the debt is not paid, nor is there a presumption of payment. There is a mere loss, a mere relinquishment of one remedy, which is not an exoneration of the lien, not a discharge of the debt, for without payment of the debt, it is not discharged, nor is the lien exonerated. Pursuit of the lien only, when the debt is barred by the statute, cannot confer a right to a personal judgment if the statute is pleaded. The only judgment or decree which can be rendered is one fixing, establishing and declaring the lien.

It is shown by the bill that the Alabama Iron Company, though purchasing without notice of the lien asserted by Curry, had not paid the purchase-money or received a conveyance of the legal estate. In England, the rule seems to be inflexible, that a purchaser will not be protected against outstanding equities, until he has fully paid the purchase-money and received a conveyance of the legal estate. So long as in either of these particulars the transaction is incomplete, notice of the equity will not only preclude him from proceeding further, but will deprive him of all right to protection for whatever may have been done without notice. The rule generally adopted in the courts of this country is less stringent. The party seeking to fasten a trust, or other equity on the legal estate, is compelled to do equity. If in good faith, without notice of the trust or equity, the purchaser has made partial payments of the purchase-money, or has made improvements enhancing the value of the lands, compensation, indemnity to him, must be approved by the



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party seeking to charge the lands, though a conveyance of the legal estate is not executed, nor the purchase-money fully paid. In the case of *Duffhey v. Frenaye*, 5 St. & Port. 215, this question was very fully considered, and the conclusion was, that in such cases exact justice would be done by fastening a lien on so much of the purchase-money as was unpaid, charging the lands with its payment. The Alabama Iron Company, though it had not delivered to Ware, the shares of its capital stock, contracted to be delivered as the consideration of the sale and conveyance of the lands, and had not received a conveyance of the legal estate, yet had in good faith, without notice of the lien asserted by the complainant, entered into possession and made very extensive and valuable improvements. The purposes of equity and good conscience are met when the rule declared in *Duffhey v. Frenaye*, *supra*, is applied, and the company is compelled to answer to the complainant for so much of the stock as will correspond to the extent of his lien on the lands. This the bill is framed to accomplish, and its special prayer is addressed to that end.

We have considered the several causes of demurrer, and do not find any one of them well taken. The decree of the Chancellor must of consequence be affirmed.

## Elliott v. Stocks & Bro.

### *Trial of the Right of Property.*

1. *Removal of cases from State to United States courts; when may be made.* An affidavit and bond, for the removal of a cause from a State court into the United States court, is filed in time, although the case has been twice continued by the consent of the party seeking to remove it.

2. *Same.*—A petition and affidavit, filed under the act of congress of March, 1867, to remove a cause from the courts of this State into the United States courts, which shows that the petitioner is a resident of another State, but fails to show that the opposing party is a citizen of Alabama, is fatally defective, and it is not error to refuse a motion for removal.

3. *Trial of the right of property; evidence as to the character of defendant's possession admissible.*—On the trial of the right of property between attaching creditors and a claimant, the creditors must prove that the property in controversy belonged to the defendant, in attachment, at the time of the levy, and, for this purpose, they may trace the title from the original owner to the defendant, and may show the character of the actual possession to disprove the authority of one actually in possession to convey or assign the property to the claimant, and, in such a case, any evidence as to the authority of the person in actual possession to convey the property, or as to the consideration of the conveyance, and its amount, is admissible.

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4. *Bona fides of the debt; to be proved by the claimant.*—If the property is held by the claimant, as a trustee for creditors, under a deed, it is also incumbent on him to show the existence and *bona fides* of the secured debts.

5. *Power of attorney; contents proved, when original beyond jurisdiction.*—Secondary evidence of the contents of a power of attorney, is admissible, when the original is shown to be beyond the jurisdiction of the court.

6. *Collective facts; witness may testify to.*—A witness may state collective facts, as that “— had no right to convey the property;” “—did not own it,” etc.; and the adverse party may, on cross-examination, bring out the facts on which the witness rests his conclusions.

#### APPEAL from Cherokee Circuit Court.

Tried before Hon. W. L. WHITLOCK.

On the 19th of July, 1875, Stocks & Bro., through John T. Stocks, a member of the firm, took out an attachment against H. D. Cothran, Thomas McCulloch, Robert Marshall, and W. S. McElwain, on the ground that they were non-residents of the State of Alabama. This attachment was levied on one hundred tons of pig iron, at the Cornwall Furnace, in Cherokee county. On the 6th of August, 1875, James M. Elliott, as trustee, interposed a claim to the property, executing a claim bond, and stating, in the affidavit, that the iron was not the property of Cothran and others, but of affiant, as trustee. On the 7th of March, 1876, Stocks & Bro. filed their complaint in the Circuit Court of Cherokee county, against Cothran and others. The complaint contained a count for money had and received, one for money paid and expended, a special one for work and labor done, and coal furnished to defendants, and a special count “averring that the defendants, in consideration of their advantage and interest, did, upon trust, undertake to operate the Cornwall Iron Works, its property and materials, in making iron, and with a purpose, on their part, fixed thereby and thereafter, to work themselves, by means of said property, into the ultimate ownership of said works, its property and materials, and thus operated the same, and the defendants, being so operating said works, its property and materials, did accept and receive of the defendants labor, and coal furnished by them, to the use and benefit of the defendants, in furtherance of their said operations, to the value of \$2,018.00. In consideration of the premises, the defendants promised, undertook, and assumed to pay the plaintiffs said amount of money, when requested, due at the dates and in sums following: \$348.00 October 10, 1874; \$430.00 April 30, 1875; \$540.00 June 3, 1875; and \$700.00 July 3, 1875. Yet the defendants have not paid the same, or any part thereof, though often requested so to do, and the same is still due, with interest thereon.” The case was continued, by consent, at the Fall Term, 1875, and at the Spring Term, 1876,

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it was again continued by the defendants. On the 6th day of September, 1876, James M. Elliott made an affidavit before the Clerk of the Circuit Court, stating therein that he was a citizen of the State of Georgia then, and at and before the 19th of July, 1875; that he was the person who, as trustee, had filed his bond for the trial of the right of property levied on under the attachment against Cothran and others; that the amount in controversy exceeded the sum of five hundred dollars, exclusive of costs; that he had reason to, and did believe, that, from prejudice and local influence, he would not be able to obtain justice in the Circuit Court of Cherokee county, Ala.; and that he made the affidavit with the view and for the purpose of having said cause removed into the Circuit Court of the United States, to be held in that district. He, also, at the same time, presented his petition for removing the case into the United States Court. This petition stated that he was, and is a citizen of Georgia; set out the issuance of the attachment, the levy, the interposition of the claim, the pendency of the suit, the amount in controversy, the filing of the affidavit for removal, and the reason given therefor; offered bond for removal, and prayed, as trustee, the removal of the cause into the United States Circuit Court. The bond having been adjudged insufficient by the court, a new one was filed by Elliott. The plaintiff demurred to the petition, because it was not filed before or at the term when the cause could first have been tried. The court sustained the demurrer and refused the petition. On the trial, an issue between the plaintiffs and Elliott, the claimant, was made up under the direction of the court, but it does not appear in the record. The plaintiffs introduced, without objection, their attachment and the sheriff's return showing the levy. They then offered in evidence a mortgage made on January 21, 1871, by the Cornwall Iron Works to Chas. H. Smith, as trustee, for the Tredegar Iron Company. In this mortgage it is recited that the Cornwall Company agreed to deliver to the Tredegar Company a specified quantity of iron, and the latter company, in consideration thereof, agreed to furnish the Cornwall Company with an acceptance for \$10,000, and also bonds of the city of Rome to the amount of \$17,000. The Cornwall Company then conveyed, by the same instrument, to Chas. H. Smith, in trust, 2,423 acres of land, and all the personal property used and employed at the iron works, for the purpose of securing the loan made by the Tredegar Company. The deed provided for the payment of certain portions of the loan at specified times, and for the manner in which the iron furnished to the Tredegar Company should be credited on the



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debt. It also contains stipulations as to insuring the property for the benefit of the Tredegar Company and directions as to how the funds should be applied in case of sale of the property by the trustee, under the power given him for that purpose, in case of default in payment. Plaintiff then offered in evidence a written contract signed by H. D. Cothran, Thomas McCulloch and Robert Marshall, as principals, and R. T. Foreche, as trustee, and assented to by Chas. H. Smith, as trustee for the Tredegar Company. This agreement was made on January 1, 1874, and recites that at a sale of the Cornwall Iron Works property, it was "bid in" by H. D. Cothran at \$66,000, with a view of operating the works by the consent of the creditors who held liens to that amount, for the benefit of such creditors and until their debts were paid, and securing for himself the ultimate ownership of the property. That Robert Marshall claims a lien for purchase-money on the land; that Thomas McCulloch was a stockholder in the company to the extent of an undivided fourth interest in the property. It is then agreed that for the purpose of harmonizing conflicting interests and preventing litigation, H. D. Cothran should operate the works, and remain in possession, and control the earnings and products subject to the trusts named, *i. e.*: 1. To pay the costs of the sale. 2. To deliver to the Tredegar Company one-half the iron manufactured, to be applied on the debt due them. 3. To pay the vendor's lien due Robert Marshall, and directing the time and manner of its payment. The agreement then recognized other claims against the property, and among them is one for \$2,000 due to Stocks and Young for coal, and one for \$4,000 for labor. After payment of these debts, it is provided that the property shall belong to Cothran, McCulloch, Marshall and W. S. McElwain, in certain proportions. The claimant objected to the introduction of this agreement on the ground that it was irrelevant, and because the defendant McElwain was no party to it. The court overruled the objection, and the claimant excepted. Thomas McCulloch was then called as a witness and testified that he and H. D. Cothran signed the contract referred to above, and that he as attorney in fact, signed Robert Marshall's name thereto. That he had a written power of attorney to sign the contract in the name of Robert Marshall; that the power was in Rome, in the State of Georgia. The claimant objected to any statement by the witness about the signature of Marshall to the contract, on the ground that the answer was not legal testimony. The court overruled the objection, and the claimant excepted. The plaintiff then offered to read the

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contract to the jury, to which the claimant objected. The court overruled the objection, and the claimant excepted.

Plaintiffs then offered a copy of an agreement between H. D. Cothran and W. S. McElwain, which was dated December 19, 1874, under which the latter was to receive possession of the iron works and property, and manage and control the same, under the terms, and on the trusts contained in the agreement between Cothran, McCulloch and Marshall. This change was ratified in writing by Charles H. Smith, as trustee for the Tredegar Company. Thomas McCulloch, one of the defendants, then testified, that the original agreement was lost; that it had been abstracted from his possession, and that he had searched for it, where he last saw it, and had failed to find it where he had kept it; that the copy offered in evidence was a *verbatim* copy of the original. The claimant objected to the copy of the agreement. The court overruled the objection, and the claimant excepted. The plaintiffs offered to read the agreement to the jury, but the claimant objected to his doing so. Thereupon the court overruled the objection and the claimant excepted. The plaintiff then offered in evidence, a letter dated January 2, 1875, purporting to be from H. D. Cothran, with a memorandum at the bottom, purporting to have been signed by Wallace S. McElwain, and addressed to Thos. McCulloch. In this letter it is stated, that "the change you refer to, amounts to W. S. McElwain's assuming the authority as superintendent, to dispose of the products of the furnace, which I as agent have held heretofore. The furnace property belongs to H. D. Cothran & Company, as per agreement signed by you and I. The contracts and agreements made by H. D. Cothran, agent, are all to be carried out by W. S. McElwain, superintendent. The object in delegating the authority heretofore held by H. D. Cothran to W. S. McElwain, superintendent, was that Messrs. Printup and Hargrove would probably assist us, if such a change was made; when they would not help us if I retained the management. Mr. McElwain will show you the agreement. Yours truly, H. D. Cothran. The foregoing statement is correct—W. S. McElwain." Thos. McCulloch testified for plaintiffs, that the signatures to said letter were in the handwriting of Cothran and McElwain, with which he was acquainted, and that he had received it through the mail. The claimant objected to the letter as evidence. The court overruled the objection, and the claimant excepted. The plaintiffs offered to read the letter to the jury, but the claimant objected. The court overruled the objection, and the claimant excepted. The plaintiffs then introduced John T. Stocks, one of the plaintiffs, who testified that he received

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a letter dated at Rome, Ga., July 14, 1875, from James M. Elliott, and that the signature was in the handwriting of Elliott. This letter was as follows: "I have had a conversation with Col. Printup since I arrived here about your claim. He requested me to write you, that he would see to it, that you should be protected, that he knew how to manage so you could get your claim in the way I mentioned, that is, on a mortgage that he controls. From what he tells me, I think you may rest easy; I will see to it that you are paid, as long as I have any control of the iron, say from the 10th of this month forward. J. M. Elliott." Plaintiffs then offered to read this letter to the jury, to which claimant objected, on the ground that it was irrelevant, and because this letter was written by Elliott, as an individual, and not as trustee for Printup Bros. & Co., but only on a conversation with D. S. Printup, a member of this firm. The court overruled the objection and the claimant excepted. Thos. McCulloch then testified, that at the sale of Cornwall Iron Works by Chas. H. Smith, as trustee in the deed of trust, in favor of the Tredegar Company, that H. D. Cothran, as agent, became the purchaser, but the money was never paid; Cothran went into possession of the property as agent, under the contract between him, Thos. McCulloch and Robt. Marshall. That afterwards W. S. McElwain went into possession of said works, as superintendent, under said Cothran as agent, in said Cothran's stead, as said agent, and operated the works. Plaintiff then asked the witness if the iron which was being made at the works was the property of McElwain. The claimant objected to the question, but the court overruled the objection, and the claimant excepted. Plaintiffs then asked the witness whether or not the iron as it ran, or issued, from the furnace at Cornwall Iron Works was the property of Wallace S. McElwain. The claimant objected, but the court overruled the objection, and the claimant excepted. The witness then stated, that the iron was not the property of W. S. McElwain. Claimant moved to exclude the answer from the jury, but the court overruled the motion, and claimant excepted. J. T. Stocks, one of the plaintiffs, was then re-called as a witness, and testified that iron was worth \$25 per ton in Rome, Ga., and it was worth in Cherokee county \$23 per ton. The claimant offered to read to the jury the deposition of Daniel S. Printup, in answer to interrogatories filed to him. The 6th interrogatory was as follows: "If you know of any other fact or facts, tending to prove that Exhibit No. 1, hereinbefore referred to, which will tend to the fairness and justice, and legality of claimant's claim, you will tell each and every such fact or facts as fully as if you were directly in-



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terrogated as to each of said facts." The answer was, "I knew that the account attached to the interrogatories is a just and *bona fide* one, and that the same in justice and law ought to be paid." The first cross-interrogatory was as follows: "What sum would you or D. S. Printup Bros. & Co. give, if plaintiffs fail in this suit?"

The answer was, "I, as an individual, would not be benefited in any way by the result of this suit. Printup Bros. may, or may not be benefited to some extent. J. M. Elliott, trustee, made advances to McElwain after July 9, 1875, for the purpose of making iron at the said Cornwall works, and it was understood that all their advances were to be paid to said Elliott, trustee, and he claims that said advances will more than cover the value of said iron."

The third interrogatory was, "Is it not true that before and after July 13, 1875, you refused to honor drafts on McElwain?" The answer was, "I, as well as Printup Bros. & Co., did refuse to honor drafts on McElwain until he gave us assurance that iron would be delivered to meet such drafts, or that he would arrange them through some other means. We did accept, and pay drafts on us by McElwain, upon condition that iron was delivered, or to be delivered to meet and pay the same. These drafts were drawn for supplies to run said works, and make iron." The plaintiffs objected to these answers, the court sustained the objection, and the claimant excepted to each ruling of the court thereon. From the deposition of said witness, it appeared that he resided in Rome, Ga., that W. S. McElwain was engaged in making iron at the Cornwall Furnace, in Cherokee county, Alabama, from April 1875, to July 9, 1875. An account due from McElwain to Printup Bros. & Co. was attached to the interrogatories which the witness stated was just, true and unpaid, and was made by McElwain. It amounted to \$13,749.07, and was for supplies to operate the iron works, it being understood that it was advanced on iron manufactured by him at said furnace. That Printup Bros. & Co. furnished nearly, if not all the means to enable McElwain to make iron. The remainder of the deposition was in answer to cross-interrogatories as to the items of the account due by McElwain to Printup Bros. & Co. A witness, Brown, the bookkeeper of Printup Bros. & Co. testified as to the correctness of the account due Printup Bros. & Co., and stated that he had presented it to McElwain, who had admitted its correctness. The claimant then offered in evidence a promissory note for \$21,402.28 on July 13, 1875, a deed of trust executed by W. S. McElwain to James M. Elliott as trustee for Printup Bros. & Co., in which, after reciting the indebtedness of McElwain to Printup Bros. & Co.,

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said McElwain conveyed the personal property on the premises known as the Cornwall Iron Works property, and all the products of the works, consisting of pig iron, including also, all the coal, wood, ore and materials on hand, to James M. Elliott in trust, to sell the same upon default. The trust deed was in the usual form. The claimant introduced G. Hampton, the deputy sheriff who levied the attachment, who testified that at the time he made the levies, the Cornwall Works were in the possession of McElwain, and were being operated by him; that he levied on some of the iron while hot, and just as it ran from the furnace. A statement made by Elliott was then introduced by agreement, as his testimony in the case. The material parts of it were as follows: "That the iron attached was not the property of H. D. Cothran, Thos. McCulloch, Robt. Marshall and W. S. McElwain, but was his property, as trustee, under the deed of trust from McElwain to him, made to secure the debt of Printup Bros. & Co. That Printup Bros. & Co. advanced the money to McElwain to make the iron, and when made, it was to be taken and held by him as such trustee, in accordance with the deed of trust. That Elliott would prove, if present, that Printup Bros. & Co. furnished McElwain money which was used in making the iron levied on; that the note mentioned in the trust deed was executed to Printup Bros. & Co. for supplies furnished by them to carry on the iron works and make iron; that the iron attached and claimed by Elliott is part of the iron so made by McElwain; that McElwain was the lessee of the iron works, and controlled the same when the iron was made, and that Cothran, McCulloch and Marshall had nothing to do with the works when the iron was made. Plaintiff, in rebuttal, introduced Thos. McCulloch, and asked him whether the property conveyed by McElwain to Elliott was the property of McElwain. The claimant objected to the question, the court overruled the objection and claimant excepted. The witness then stated that the property did not belong to McElwain, and that he had no right to convey it. There was a judgment by default on proof of publication, against Cothran, Marshall and McCulloch, and "a jury and verdict against W. S. McElwain." There was a judgment in the claim suit, condemning the property attached to the satisfaction of the plaintiff's claim. The claimant brings the case to this court, and assigns as error, the rulings of the court on the removal of the case into the U. S. Court, and on the evidence.

WATTS & SONS, for appellant.—Under the act of Congress the appellant, on the allegation of his petition, had the right to have the case transferred to the United States Court, and

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it was error to refuse it.—See Rev. Statutes of U. S. on page 113, § 639. The petitioner had the right to file this petition, at any time before the trial. The questions asked the witness McCulloch, as to the ownership of the property, called for the opinion of the witness, and the answers were improper for the same reason.—*Wall v. Williams*, 11 Ala. 826; *Bullock v. Wilson*, 5 Porter, 338.

The answer of Printup is in response to the question propounded, and there was no objection to the question.—*Yarborough v. Hood*, 13 Ala. 176; *Wilkinson v. Mosely*, 30 Ala. 562. His answer to the first cross-interrogatory was responsive to it, and it was error to exclude it from the jury. His answer to the third cross-interrogatory was but a response to it, there was nothing illegal in it, and it should have gone to the jury. The witness had the right to explain his refusal to honor the drafts. Without this explanation the answer would not have told the whole truth, and great injustice would have been done the witness and the claimant. The court had no right to exclude any part of this answer. *Crymes v. White*, 37 Ala. 549.

WALDEN & SON, and BRAGG & THORINGTON, for appellee.--The affidavit made by appellant for the removal of the cause is deficient, because it does not show the citizenship of the appellees. This was as necessary under the act of Congress as the statement of the citizenship of the defendant. Nor was the petition filed in the proper time, for there had been two continuances of the cause.—*Ex parte Grimbail*, 61 Ala. 589; *Dillon Rem. of Causes*, 25. The letter from Cothran to McCulloch was properly admitted to explain McElwaine's possession of the iron works. The letter from Elliott to Stocks was admissible to show notice of Stocks & Bro.'s claim. Ownership is a fact to which a witness may testify.—*Chenard v. Walters*, 14 Ala. 151; *Martin v. Linton*, 18 Ala. 690; 11 Ala. 826; 5 Port. 338; 1 Ala. 632; 10 Ala. 460; 27 Ala. 651. Printup's answers to the sixth direct, and to the first and third interrogatories, were properly excluded. The authorities cited by appellant give no sanction to such answers.

STONE, J.—The question which meets us at the threshold of this case is, did the Circuit Court err in refusing to remove the claim suit, or trial of the right of property, to the Circuit Court of the United States? The application was made under the act of Congress, approved March 2d, 1867, which is in the following language: "That when a suit may hereafter be brought in any State court, in which there is



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controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit, stating that he has reason to, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in the State court for the removal of the suit into the next Circuit Court of the United States," &c. Under the various rulings which have been made under this statute, the appellant made and filed his affidavit in time, and in the matter of giving bond, conformed to all the statute required, if the affidavit be sufficient.—U. S. Rev. Stat. § 639; *Ins. Co. v. Dunn*, 17 Wallace, 214; *Railroad Co. v. McKinley*, 99 U. S. 147; Removal Cases, 100 U. S. 457; *Bible Society v. Grove*, 101 U. S. 610; *Mining Co. v. Woods*, 8 Amer. Rep. 799; *W. U. Tel. Co. v. Dickinson*, 13 *Ib.* 295; *N. Y. Warehouse Co. v. Loomis*, 23 *Ib.* 272. There is, however, a fatal defect in the petition and affidavit for removal, which is not supplied or remedied by any part of the record on file at the time the application was made and overruled. It sufficiently shows that Elliott, the petitioner, was a resident of the State of Georgia. It fails to show that Stocks & Bro., or either of them, was a resident of the State of Alabama. The Circuit Court did not err in overruling the motion for removal.

It was necessary for plaintiffs to prove, in the trial of this case, that the property in controversy belonged to the defendants in attachment, and to disprove, if necessary, any asserted or assumed right in McElwain to convey it. Elliott's claim and right rested alone on McElwain's conveyance, and any legal testimony offered tending to disprove his authority to execute the trust deed, could not be ground of error. The title to the iron-works property, real and personal, appears to have been, at one time, in the Cornwall Iron Works Company. It was allowable to plaintiffs to prove that fact, and to trace the title and ownership through its various stages, down to the defendants in attachment. It was also permissible to prove the nature of McElwain's possession, and, by doing so, to disprove his authority to make a trust deed, assigning the property, and the products of the Iron Works. Each and all of the documents offered in evidence in this cause, tended to show either the ownership of the property in the defendants in attachment, or the nature and extent of McElwain's possession, and power over the property.

There were, at least, two important questions which were necessarily and prominently raised by the issue in this cause.

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First. Whether there was a *bona fide* debt, and the amount of it, to uphold the deed in trust from McElwain to Elliott, trustee. Second. Whether McElwain had any, and what authority to make that conveyance? In considering these questions, we must ignore all extraneous claims and interests. If the Tredegar Iron works, or Smith, or Foreche, trustees, have any claim to the property in controversy, it is not shown in this record, and, in fact, could not have been, for they are strangers to the record. Both the plaintiffs in attachment, Stocks & Bro., and the claimant, Elliott, rest their respective claims on the original ownership of McElwain, and the other defendants in attachment. Stocks and brother claim as attaching creditors of the former defendants in attachment; and Elliott claims as trustee under the trust deed made by McElwain to him in trust for the benefit of Printup Bros. & Co. So that neither party can derive any benefit in this issue from any claim of the Tredegar Iron Works, or its trustees may assert. The plaintiffs, to maintain their suit, must establish the ownership of defendants in attachment, when the attachment was levied. The claimant, to succeed, must show McElwain's right to convey, and actual conveyance by him, before the attachment was levied, and the existence of a debt unsatisfied, secured by the trust deed. Any legal evidence, tending to prove either of these propositions, was admissible. It will not do to say, in reply to this, that the documentary evidence showed McElwain was without authority to bind the other defendants. He was one of the defendants himself, claimed to be part owner of the property, and whether or not he could convey his own interest in the property described in the trust deed, it would, perhaps, be improper for us to determine in the present state of this record.

The question raised on the admissibility of secondary evidence, of the contents of the written power under which McCullough executed the contract for Marshall, will not, probably, arise again, should this case return to the Circuit Court. Coming up as the question does, with proof before the court, that the power of attorney was in the State of Georgia, beyond the jurisdiction of the court, this authorized secondary evidence of its contents.—1 Whar. Ev. § 130, and note 6; 1 Greenl. Ev. § 558; *Shorter v. Sheppard*, 33 Ala. 648; *Scott v. Rivers*, 1 St. & Por. 19.

In suppressing the answer of the witness, Printup, to the 6th interrogatory in chief, and to the first and third cross-interrogatories, the Circuit Court erred. They were reasonably responsive and explanatory of the subject called for in the interrogatories, and tended to prove the existence of the

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debt on which Elliott's claim was founded. That being a necessary part of the issue formed, we are unable to say what influence such testimony might have exerted.

Many objections were urged to answers of the witness McCullough. We think none of them are well taken. They were but the statement of collective facts, which, as a rule, witnesses may depose to. If the claimant desired to know the foundation on which the witness rested his conclusions of fact, he should have interrogated him on that subject. *S. N. Railroad v. McLendon*, 63 Ala. 266.

The judgment of the Circuit Court is reversed, and the cause remanded. -

## Shook v. Blount et al.

### *Action for Breach of written Contract to collect Note Delivered as Collateral Security.*

1. *Release ; duty of court to construe decree relied on as.*—When the defendant relies on a decree of the Chancery Court to show a release of the plaintiff's cause of action, the court must construe the decree, and determine from its face, whether it was intended to operate as a release, and a charge which submits this question to the jury is erroneous.

2. *Same ; when parol evidence of consent of parties to decree relied on is not admissible.*—When, in such a case, the decree shows nothing on its face which operates as a release, parol evidence that the plaintiff's solicitors consented to the decree, is illegal and incompetent.

APPEAL from Etowah Chancery Court.

Tried before Hon. N. S. GRAHAM.

This was an action brought by W. T. Shook against Jos. G. Blount and Samuel Henry, and was founded on the following contract: "Gadsden, Ala., Sept. 1871. Be it known that I have this day given the following notes" (describing them), "and to secure the prompt payment of the above named notes, I have this day placed in the hands of Henry and Blount the following collateral, to-wit: one note of hand for the sum of thirty-five hundred dollars, given by H. H. Miller to me for the purchase-money of land, for which land I have only executed bond for titles, but I have not made titles, and in the event of the non-payment of said notes by the first day of April next, then the said Henry and Blount are to proceed to collect the aforementioned collateral, and out of the proceeds pay the expense incurred in collecting said collateral, and then the above mentioned notes and



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the remainder, if any, turn over to the said W. T. Shook. W. T. Shook." The complaint averred that the notes were not paid at the time specified in the contract; that defendants received Miller's note under this contract; that Blount and Henry filed a bill to enforce the vendor's lien on the land; that they obtained a decree for the full amount of the note, principal and interest, but that afterwards, by agreement with Miller, a decree was entered that the land should be sold only for the amount of the secured debts, and the cost of collecting the note; that there was three hundred and seventy dollars due on the note in excess of this amount, which Blount and Henry failed to collect. The evidence for the plaintiff, on the trial, tended to show the truth of these averments. The defendant, who had pleaded "in short by consent": 1. Performance of all the stipulations of the contract. 2. That plaintiff, on the 23d day of June, 1873, released and discharged defendants from all liability on account of said contract. 3. Accord and satisfaction, introduced in evidence a decree of the Chancery Court of Etowah, to show a release by the plaintiff. This decree, which is set out in the opinion of the court, was obtained on the bill filed by Blount and Henry, against Miller, on the purchase-money note delivered to them by the plaintiff, Shook. In that cause said Shook had filed a cross-bill, asserting his right to any balance remaining after the payment of the secured debts, and the costs of collecting the note. This cross-bill, and the original bill, were both dismissed. The defendants introduced evidence to show that counsel, who represented Shook, had agreed to the decree of June 23, 1873. Plaintiff objected to the introduction of this evidence. The court overruled the objection and defendant excepted. There was also evidence introduced by the plaintiff to show that neither he nor his solicitor had consented to that decree. On this state of facts the court gave the charge to the jury which is set out in the opinion. The giving of that charge, and the admission of the evidence as to the plaintiffs consenting to the decree, is assigned as error.

M. J. TURNLEY, and W. H. DENSON, for appellants.—It was the duty of Blount and Henry, under the contract, to collect Miller's note, pay the expense of collecting it, and the secured debts, and then turn over the remainder to appellant. When it was shown that Blount and Henry had collected enough to pay the secured debts, and the costs of collecting, and that there was a balance remaining due on the note, which they had failed to collect or pay over, appellant's case was made out. Blount and Henry attempted to show that they were

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released by a decree of the Chancery Court, but this decree does not show any release on its face. The court should have excluded the evidence as to the negotiations and motives which led to the decree, because they were all consummated by, and merged in it.—1 Brick. Digest, 865, §§ 866, 867, 868.

WATTS & SONS, for appellees.

STONE, J.—The instrument declared on in this case bound Blount and Henry, in a certain event which happened, to collect the note of Miller, pay certain specified debts out of the proceeds, and pay the balance to Shook. The balance of the note, some three hundred and seventy dollars, Blount and Henry failed to collect. It is contended for defendants, appellees here, that Shook released them from that part of their contract, by having knowledge of, and assenting to the decree of June 23d, 1873. That decree finally disposed of all the funds, except the said balance, and left that open for further litigation, raised by Miller's cross-bill against Shook, his co-defendant. The Chancellor had decreed there was a lien on the land as follows: "And it appearing to the court from said report that there is due on the note from said respondent Miller to respondent Shook, mentioned in said bill and claimed as collateral security by complainants, the sum of four thousand, one hundred and ninety-five dollars and thirty-two cents, up to this date. It is, therefore, adjudged and decreed by the court that said note is a lien upon the lands described in complainant's bill, to the amount of said note and interest, as above stated." The decree then, as we have said, postponed or reserved the consideration of said balance of three hundred and seventy dollars. Both the original, and Miller's cross-bill, were subsequently dismissed by the Chancellor, without further notice or disposition of said three hundred and seventy dollars. There was oral testimony, *pro* and *con*, that Shook's solicitor had knowledge of, and assented to the terms of the decree of June 23d, 1873.

The charge of the court was, "that if the jury believed from the evidence that plaintiff Shook consented to the decree of 23d June, 1873, contained in said record read to them, and that at the time he did so he intended it to operate as a release of the defendants, Henry and Blount, from the collection of the balance of said Miller's note, then plaintiff could not recover." In giving this charge the court clearly erred. The construction of the Chancellor's decree of June 23d, 1873, was a matter for the court, and the intention of

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the parties should have been determined by the court from the face of the decree itself. There is nothing in the decree which releases Blount and Henry from any obligation to collect the residue of the Miller note, and the court should have so instructed the jury. If Miller had obtained a decree on his cross-bill against Shook, defeating the collection of that balance, that would have exonerated Blount and Henry. But Miller's cross-bill was dismissed.

There was nothing in the objection that witnesses were allowed to testify to the argument of counsel in reference to the decree. If such testimony had had any bearing in the case, it could have been proved in no other way, not being in writing. The fatal objection to it is, that it was worth nothing when proved, as it neither did, nor could exert any influence in the construction of the Chancellor's decree.

Reversed and remanded.

## Kelly, Ex'r, v. Garrett, Ex'r.

*Petition by Executor, in Probate Court, to have Homestead Set Apart for Minor Heirs.*

1. *Creditor; is person in adverse interest in proceeding to set apart exemptions for minor heirs.*—When commissioners, appointed at the instance of the personal representative, by the Probate Court, to set apart property as exempt for the benefit of the minor children of a decedent, make their report, a creditor is a "person in adverse interest," and may file written exceptions to the allowance of the claim.

2. *Report of commissioners to set apart homestead; when error to confirm.*—When on the day that a petition was filed by an executor to set apart property as exempt for the benefit of the minor heirs of a decedent, commissioners were appointed for the purpose, who reported ten days thereafter, an order of the Probate Court confirming their report on the same day, is unauthorized and should be vacated on motion.

3. *Same; jurisdiction of the Probate Court to try exceptions to.*—As the statutes require the issue formed on exceptions to such a report to be certified to the Circuit Court for trial, and expressly prohibit the Probate Court from exercising jurisdiction to try the right of homestead, its proceedings on the trial of such exceptions, are *coram non jure*, and absolutely void.

4. *Exemptions against creditors; by what law determined.*—The right to a homestead, or other exemptions, as well as their value and extent, are determined, as against creditors, by the law which was of force when the debts were contracted, but the proceedings for their allotment may be regulated by a subsequent law.

5. *Domicil of child determined by domicil of father.*—The domicil of the father during his life, is also the domicil of his infant child, and the latter does not lose his right to claim property as exempt to him on the death of his father, although, at that time, he is in another State attending school.



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**APPEAL from Coosa Probate Court.**

Heard before Hon. JOHN S. BENTLEY.

On October 5th, 1877, Elmore Garrett, as executor of the last will of William Garrett, deceased, filed his petition in the Probate Court of Coosa county, where the administration of the estate of said William Garrett was pending, praying that a homestead, and other exemptions, be set apart to his minor heirs. The executor alleged in his petition, that William Garrett left certain real property, which is described therein, upon which the homestead of the family was situated; that the testator left surviving him, two children under twenty-one years of age, Lewis C., and Phineas Garrett; that the last will of William Garrett had been duly admitted to probate, and that the petitioner was proceeding to administer his estate under the provisions of his will. The petition averred that the infant children were entitled to a homestead of one hundred and sixty acres of land, and prayed that three disinterested persons should be appointed, under the sixteenth section of the act of April, 1873, as commissioners to set apart a homestead for said minors. On the filing of said petition, the court made an order appointing the commissioners; and on October 5th, 1875, issued to them a commission directing the amount of property to be set apart to said minor heirs. On the 15th of October, 1875, at a "special term," the Probate Court confirmed the report of the commissioners, which set apart to the minor heirs one hundred and sixty acres of land, not exceeding in value \$2,000, and certain personal property, not exceeding \$1,000 in value. On the 18th of December, 1875, John B. Kelly, as executor of the will of James A. Kelly, deceased, filed a motion to set aside the order confirming the report of the commissioners. This motion stated that at the time of the death of William Garrett, in August, 1876, he was indebted to Jas. A. Kelly, appellant's testator, to the amount of \$500, which was evidenced by a promissory note, due December 18, 1867, for that amount, which was under seal, and on which there were credits, leaving the amount still due thereon about \$500; that he was a party in adverse interest, and moved to set aside the order confirming the report of the commissioners, because, 1. It was made before the expiration of ninety days from the time of the appointment, or report of the commissioners. 2. Because it was made at a "special term" of the Probate Court, and was, and is, void. J. B. Kelly, as executor, also filed exceptions to the report of the commissioners on the ground: 1. That one of the heirs for whose benefit the petition was filed, was of full age when the petition to set apart the exemptions was made. 2. That the other heir

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for whose benefit it was filed was a non-resident of Alabama. 3. That the homestead and exemptions were set apart by the commissioners under the act of 1873, and were in excess of the amount of such exemptions in force on December 18th, 1867, when the debt due James A. Kelly was contracted. Upon the filing of this motion, and said exceptions, a citation was issued to Elmore Garrett as executor, who appeared, and an issue being made up between him and J. B. Kelly, as executor, the Probate Court, on June 10, 1878, proceeded to hear and determine said motion and exceptions. It was proven that J. B. Kelly, as executor of the will of Jas. A. Kelly, was a creditor of the estate of William Garrett, to the amount, and in the manner stated in his motion and exceptions; that Phineas Garrett left Alabama about four years before his father's death, and had not been in the State since that time. The testimony also showed that said Phineas was at school in another State, and that his father retained control over him. The Probate Court rendered a decree overruling the motion to set aside the order confirming the report of the commissioners, and "overruled each and every one of the exceptions filed by said J. B. Kelly," who excepted "separately and severally to this action of the court." The errors assigned are the rendition of the decree, and the overruling the motion, and the exceptions filed by appellant.

LEWIS E. PARSONS, Jr., for appellant.—A creditor is a person "in adverse interest," and within the terms of the statute allowing such persons to file written exceptions to the report of the commissions to set apart property as exempt.—*Smith v. Phillips*, 54 Ala. 8. Appellant being entitled to file the exceptions his motion should have been granted.—*Curtis v. Williams*, 33 Ala. 370. The report of the commissioners was confirmed by the Probate Court on the same day it was made, when, by the very terms of the statute, the appellant was allowed ninety days in which to file exceptions. The order was prematurely made and should have been vacated. It was not grantable as of course, and was void because it was made at a special term of the court, to which it was not made returnable, and to which it had not been adjourned. *Boydton v. Nelson*, 46 Ala. 501. The debt due appellant's testator was contracted in 1867, and the allowance of the exemptions was made under the act of 1873. In the case of *Gunn v. Barry*, 15 Wall, 610, the Supreme Court of the United States held that the provision of the constitution of Georgia increasing the amount of exemptions after the debt was contracted, which was sought to be enforced, was void. This authority is binding on this court. The law in force

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when the debt was contracted governs the exemptions. *Anthony v. Anthony*, 55 Ala. 344. There was no statute in force at the time of the death of Wm. Garrett, August, 1876, (*Cowles v. Marks*, 55 Ala.) which allowed exemptions against the debt due appellant's testator. The exceptions to the report of the commissioners should have been certified to the Circuit Court; the Probate Court had no jurisdiction to try them.—Code 1876, §§ 2841, 2838.

F. L. SMITH, for appellee.—The allowance of the exemptions on this case were governed by the statute of April 23, 1873. The family of Wm. Garrett are certainly entitled to an exemption of some property, and in determining what should be allowed them the court is governed by the law in force at the death of the parent.—*Taylor v. Pettus*, 52 Ala. 287; *Taylor v. Taylor*, 53 Ala. 135; *Rottenberry v. Pipes*, 53 Ala. 447. Exemption laws should be liberally construed. *Webb v. Edwards*, 46 Ala. 11.

SOMERVILLE, J.—This is a proceeding before the Probate Court, originating in a petition filed by the appellee, as executor of the last will and testament of William Garrett, deceased, seeking to have a homestead and other property set apart as exempt for the benefit of two minor heirs, the children of the testator. The application was granted, and the exemptions allowed under the provisions of the act of April 23, 1873.—Session Acts 1872-73, pp. 64-69.

The case is brought here on certain exceptions taken to the report of the commissioners, who were appointed by the probate judge to make the selection and valuation of the exempted property. These exceptions were disallowed by the court, and an appeal was taken from the decree by the appellant, who is the personal representative of a creditor of the testator's estate. In cases of this character, the statute allows written exceptions to the allowance of the claim, to be filed by "the personal representative or *any person in adverse interest*," but requires this to be done "within *thirty days* after the expiration of the *sixty days*" given the commissioners for making return of their report.—Code, (1876), § 2841.

The appellant, as executor, was a creditor of the estate of William Garrett, and was, therefore, within the meaning of the statute, "a person in adverse interest." As said by this court in *Smith v. Phillips*, BRICKELL, C. J., "the whole law of administration is founded on the theory that they (creditors) have an interest, and the primary interest, in the estate." *Ib.* 54 Ala. 8. And the method and remedy resorted to for



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ascertaining the exemptions were permissible and proper under the provisions of § 2844 of the Code, in as much as the proceedings were commenced on October 8, 1877, after the latter section was amended by the act of February 9th, 1877.

The record shows, that, on the same day the petition was filed, commissioners were appointed to set apart the exemptions, who made their report on October 18th, 1877—ten days thereafter. The probate judge confirmed the report immediately, on the same day it was made. This action was premature and unauthorized by law. It does not appear to have been made at a *regular, or special*, adjourned term, and it was not such an order or proceeding as is authorized to be had, or granted at any other time, in contemplation of section 701 of the present Code, (1876).—*Arrington et al. v. Roach, Adm'r*, 42 Ala. 155.

It was otherwise objectionable on the ground, that the personal representative and creditors of the estate are allowed ninety days within which to file exceptions, for the purpose of contesting the claim before the probate court. The appellant was debarred of this right, by this improvident proceeding, which ought to have been vacated on the application of the injured party.—Code (1876), § 2841; *Curtis v. Williams*, 33 Ala. 570.

The probate court, furthermore, had no jurisdiction to try the exceptions filed to the allotment of the homestead. The statute expressly declares that "the issue formed therein shall be certified by the probate court to the *circuit court* of the county, and shall be therein tried at the next term thereof, and the judgment of such circuit court therein shall be certified back to the probate court for further proceedings, &c." Code (1876), § 2851. Section 2833 of the Code inhibits the exercise of such jurisdiction in the following peremptory words: "*In no case* shall the trial of the right of homestead be had before a *judge of probate* or justice of the peace."

The proceedings of the probate court in regard to the homestead, being *coram non judice*, are absolutely void.

There is still another objection to the decree and proceedings of the probate court, which must prove fatal to their legality.

Section 2844 of the Code (1876) provides, that, in all cases of debts or demands, contracted at any time before the State constitution of 1868 became operative, an exemption shall be allowed, the *quantum* of which shall be determined by the statute law which was of force when such debts or demands was contracted."

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The claim represented by appellant in this case was contracted December 17th, 1867.

The above statute is merely declarative of what the law would otherwise have been, as since decided by this court in *Nelson v. McCrary et al.* 60 Ala. 301, and *Fearne v. Ward, Adm'r*, 65 Ala. 33.

These cases hold, in conformity to the doctrine declared by the Supreme Court of the United States, in *Gunn v. Barry*, 15 Wall. 610, that the right to a homestead exemption, *as against the claim of creditors*, is to be determined by the law which was of force when the debt was contracted, and not by a subsequent law, which was of force when the property was acquired; and that a subsequent statute, when enlarging homestead exemptions, cannot operate on existing contracts without impairing their obligation. In other words, all contracts have reference to exemption laws, existing and in force at the date or time at which they are entered into by the contracting parties. The probate court erred in ignoring this principle. It was proper to pursue the method and remedies authorized by the present Code in ascertaining and determining the exemptions claimed by the petitioner. But the *quantum* of the exemptions, both of real and personal property, if any are allowable at all in this case, ought to have been determined by the laws in force on the date of the claim or debt, not by the act of April 23, 1873, as was improperly done in this case by the court below.

It is insisted by appellant that Phineas Garrett, one of the minors, who was a beneficiary of this application, was a non-resident of the State, and on this ground not entitled to any exemption allowed by statute. He had, prior to his father's death, been sent to Rhode Island, where he was attending a free school in that State. It does not appear that he left Alabama for any other purpose, or that he had any intention of permanently remaining absent.

During the life of the father, his domicile was also that of the minor. It is frequently said that one's original domicile "clings closely," and the law does not readily presume its change, certainly not when absence is temporary, and is attended with *animus revertendi*.

In Troy's Election Case, 71 Penn. State Rep. 302, it was properly held, that a student, who had gone to a literary institution for the purpose of receiving an education, and intending to leave after graduation, does not lose his original domicile. The exception based on this ground was without merit.

For the above errors, the decree of the Probate Court is reversed, and the cause is hereby remanded.

[Park et al. v. Wiley.]

**Park et al. v. Wiley.***Bill in Equity to Enforce Vendor's Lien on Land.*

1. *Interest; attaches from maturity of debt.*—Unless there is an agreement to the contrary, interest attaches as an incident to a debt, from the moment it is due.

2. *Same; what absolves debtor from payment of.*—A tender of the amount due, at the maturity of the debt, or a subsequent tender of that amount, including accrued interest, if not merely gratuitous, will absolve the debtor from future liability for interest.

3. *Tender, or agreement to waive interest, affirmative matter.*—A tender is an affirmative plea, both at law and in equity, and the burthen of proving it rests on the party pleading it, and the making of an agreement to absolve the debtor from the future payment of interest, is affirmative matter, and must be proven by the party relying on it.

4. *Same; how vendee absolved from payment of vendor being unable to make title*—If the vendee of lands offers to pay the purchase-money, at the time appointed, and the vendor is unable to make titles, and another day is appointed for that purpose, the vendee, to relieve himself from the payment of interest, must pay, or tender the money on that day.

5. *Same; same.*—If, in such a case, the vendor declines to receive the purchase-money because he is not able to make titles, the vendee will not be compelled to pay interest if the tender is kept open.

6. *Tender; how kept open.*—When a tender is relied on, the party making it must keep the money (though not the identical coin or notes, but money of a like kind) safely, so that he may produce it when required, and in this way the tender is kept open for the acceptance of the party whenever he shows a willingness to accept it.

7. *Same; when insufficient.*—When the evidence shows that the party making the tender borrowed the money to be used for that purpose, and immediately returned it to the lender, such a tender is insufficient, and will not absolve the party from the payment of interest.

8. *Same; money must be paid into court to support plea of.*—A plea of tender cannot be supported, unless accompanied by the payment of money into court.

**APPEAL from Pike Chancery Court.****Heard before Hon. H. AUSTILL.**

This was a bill in chancery, filed on the 17th day of April, 1880, by Glenn Park and others, as the heirs at law of R. H. Park, deceased, against Henry C. Wiley to enforce a vendor's lien on certain lands therein described. The bill alleged that on the first day of March, 1869, said R. H. Park sold said land to Henry C. Wiley, who, in consideration of such purchase, executed his promissory note for \$400; that no deed had been made to the defendant, but that said Park had given his bond to make titles; that the defendant, Wiley, was in possession of the land, and had paid two hundred dollars on the purchase-money note—fifty dollars on



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April 1, 1869, and one hundred and fifty dollars on January 5, 1870. The bill prayed that the amount due on the note might be ascertained and a lien declared on the land to that extent, and the land sold for its payment. The defendant answered the bill under oath, and stated that he had paid part of the purchase-money before it was due; that on the day fixed to make titles to him by the bond for title given him by said Park, he borrowed eighty-five dollars from W. C. Wood, and tendered to R. H. Park the whole amount of the purchase-money, and demanded the purchase-money note and a title to the land; that said Park took the money thus tendered him, counted it over, and handed back two hundred dollars of it, telling the defendant, Wiley, to keep it until he could ascertain whether he (Park) had made a mortgage on the land to one Siler, and instructed the defendant to endorse on the bond for titles the following words: "In consequence of not being able at this time to make title to the land described within, to H. C. Wiley, I hereby extend the terms and conditions of the within bond to the 12th of September, 1870. January 5, 1870. R. H. Park." The evidence showed that the money borrowed to make the tender was immediately returned to the lender. The answer also stated that "the respondent then told said Park (when he refused the tender,) that he, respondent, would not and could not be responsible for interest after that time, and that said Park agreed and assented to this. The Chancellor decreed that the respondent, Wiley, was not chargeable with interest on the note, and referred it to the register to ascertain the amount due on the note, excluding interest. The error assigned is the rendition of the decree, relieving the respondent, Wiley, from the payment of interest.

J. D. GARDNER, for appellants.

GRIFFIN & WOOD, for appellee.

BRICKELL, C. J.—As the case is now presented, there is but a single question for decision; the liability of the appellee for interest on the note given by him for the purchase-money of the lands. It is claimed that he is absolved from liability, because at the maturity of the note he made a tender of the amount due to the payee of the note, the ancestor of appellants, and that the money was in fact received, and returned to him under an agreement that he should retain it without interest, until it was ascertained whether there was an incumbrance on the premises, which must be removed before a good title could be made to the appellee. In this

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State, interest attaches to a debt, as an incident from the moment it is due, unless there is some agreement to the contrary.—*Whitworth v. Hart*, 22 Ala. 343; *Cheek v. Waldrum*, 25 Ala. 152; *Hollingsworth v. Hammond*, 30 Ala. 668. A tender of the amount due at the maturity of a debt, or a tender subsequently of the amount including interest, will absolve the debtor from future liability for the payment of interest.—*Rudolph v. Wagner*, 36 Ala. 698. And an agreement waiving the future payment of interest, if not merely gratuitous, will relieve from liability.—*Kyp v. Bostick*, 18 Ala. 589; *Cox v. M. & Y. R. R. Co.* 37 Ala. 320.

A tender is an affirmative plea, whether interposed at law or in equity, the burthen of proving which, rests on the party pleading it. And the making of an agreement by the creditor, relieving the debtor from the payment of interest, a legal incident of the contract, is affirmative matter to be proved. The endorsement on the bond for title, shows no more than that the vendor was unable on the day of its date (a day subsequent to the maturity of the note for the payment of the purchase-money,) to make title, and that the time for making title was extended to the 12th September following. It is its own best expositor of the agreement between the parties, and bears no indication of a purpose on the part of vendor or vendee, to waive the payment of interest. If a vendee of lands offer to pay the purchase-money at the time appointed, and the vendor is then unable to make title, and another day is appointed for the making of title, it is incumbent on the vendee to pay, or tender on that day, if he would relieve himself from interest.—*Bass v. Gilliland*, 5 Ala. 761. Or, if the vendor should decline to receive the money, because of his inability to make title, it would be inequitable to compel the vendee to pay interest, if he kept the tender open, and continued in readiness to pay. In the present case, it is apparent the tender was not kept open, nor did the vendee continue in readiness to pay. A part of the money had been borrowed, and it was immediately returned to the tender, the vendee deriving benefit from its use. When a tender is relied upon, the duty resting on the party making it, is to keep the money safely, not the *identical* coin, or bank notes, but money of like kind, so that he may produce it when required. The tender is then kept open, ready for the acceptance of the other party, whenever he manifests a willingness to receive the money.—7 Wait's Actions & Def. 592. The facts shown in the record, are insufficient to show an agreement by which the appellee was relieved from the payment of interest, and they are insufficient to prove the plea of tender. The plea could not be

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supported in any event, because it was unaccompanied by the payment of the money into court.—*Daughdrill v. Sweeny*, 41 Ala. 310; *McGuire v. VanPelt*, 55 Ala. 344.

Reversed and remanded.

## Hastie & Silver v. Aiken et al.

### *Bill in Equity for Settlement of Trust, and Distribution of Funds.*

1. *Express trust; statute of limitations does not run against.*—The statute of limitations does not begin to run against an express and continuing trust, until the trustee disavows and repudiates the trust, and this disavowal is brought to the knowledge of the *cestui que trust*.

2. *Cestuis que trustent; can not set up statute of limitations against each other.* *Cestuis que trustent* can not set up the statute of limitations against each other, unless the trustee himself could make this defense against the *cestui que trust*.

3. *Same; evidence as to shares of, in trust fund.*—On a bill filed by a *cestui que trust*, against another *cestui que trust*, and the trustee, who holds funds belonging to them as late partners for a settlement of the trust, any evidence, such as the state of the partnership accounts, showing the relative proportion of, due to the claimants out of the fund, is admissible.

4. *Decree; what is such a final decree as will support appeal.*—A decree which settles all the equities between the parties is final, and will support an appeal, although it may be necessary to ascertain the respective shares of the parties in a fund in controversy.

### APPEAL from Mobile Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill filed July 13, 1880, by J. H. Hastie and W. H. Silver, as executors of the will of J. H. Hastie, Sr., against Clara Aiken, as administratrix of the estate of Alma Aiken, deceased. The bill avers that in December, 1867, John H. Hastie and Clara Aiken, of Baldwin county, formed a partnership in the lumber business, under the name and style of Aiken & Hastie; that Mrs. Aiken was to furnish the mill, and Hastie was to give to the business his personal supervision and management, having full control of it; that the profits and losses were to be equally divided, the firm paying for all supplies and materials and all expenses; that the partnership was continued for about six months, and was then dissolved; that during its continuance it had shipped lumber to New Orleans, to Ward & Hobson, to the value of \$3,200; that on the dissolution of the firm Mrs. Aiken had ordered Ward & Hobson not to pay this sum over to said Hastie; that Mrs. Aiken and J. H. Hastie entered into the



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following agreement : "There is a sum of money in the hands of Messrs. Ward & Hobson, of New Orleans, amounting to \$3,209.43, and the right to, and ownership of it, is claimed by both. The money is not drawing interest ; we, therefore, hereby agree that we will give a joint order for the same to Messrs. Price Williams & Son, who shall raise a special account on their books with Hastie & Aiken, and they shall proceed to invest the same in some good bonds, or mortgages on property in Mobile, and the proceeds of the coupons from such bonds, or the interest arising from the mortgage, or mortgages, said Price Williams & Son shall invest, from time to time, until such time as the said Hastie & Aiken shall draw said money, bonds, or mortgage by joint order, or the ownership being decided in law. In testimony whereof, we hereto set our hands and seals, this 29th day of January, 1873. (Signed in duplicate.) J. H. Hastie ; Clara Aiken." That the money was drawn by Price Williams & Son from Hobson & Ward ; that said Hastie paid with his own money many of the debts of the firm of Aiken & Hastie, and wound up all the business of the firm except the balance in the hands of Price Williams & Son ; that during the continuance of the partnership all materials furnished by either partner, or whatever sums were drawn on account of the partnership, was duly credited on the books of the firm ; that John H. Hastie died in March, 1875, and that complainants are the duly qualified executors of his will ; that Mrs. Aiken died intestate in August, 1877, and that the respondent, Alma Aiken, is the duly qualified administratrix on her estate ; that the fund in the hands of Price Williams & Son belongs to the estate of J. H. Hastie. The bill makes said Alma Aiken a party defendant thereto, as administratrix, and also Price Williams, as the surviving partner of the firm of Price Williams & Son, and prays that the fund may be decreed to belong to said Hastie. The administratrix of Mrs. Aiken's estate filed an answer, in which she denied that the fund in controversy belonged to John H. Hastie, but averred that it was the property of her intestate, and, also, filed a demurrer to the bill, on the ground : 1. That the bill was filed to settle an implied trust, and the right is barred by the statute of limitations of six years. 2. That the bill was filed to enforce a settlement of partnership accounts in determining which of the partners was entitled to the trust fund, and that the remedy was barred by the statute of limitations of six years. The respondent, Price Williams, also filed an answer, in which he averred that he held the money under the agreement which is set out above, and also demurred to the bill, on the ground that it was multifarious, seek-

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ing to enforce the settlement of a trust, and at the same time seeking an account of partnership transactions.

The Chancellor overruled the demurrers, and rendered a decree declaring the complainant entitled to relief, and referred it to the register to ascertain whether the fund belonged to complainant's testator, or to Alma Aiken, as administratrix. 2. To state an account between the members of the firm of Hastie & Aiken. 3. What is the amount of the fund in the hands of Price Williams, held by him under said agreement? 4. What is a reasonable compensation for the trustee, for his services to the trust estate? This decree, and the decree overruling the demurrers, are assigned as error.

WATTS & SONS, for appellant.—The Chancellor refers it to the register to ascertain whether the fund belongs to the complainant. This was the very question the bill was filed to settle. Yet the decree declares the complainant entitled to relief. This is inconsistent and erroneous. If the bill was filed to settle the accounts of a partnership it was barred by the statute of limitations of six years.—*Bradford v. Spyker*, 33 Ala. 134. If the whole of the fund belonged to John H. Hastie he had an adequate remedy at law, and the complainants may still assert it. But if the fund is partnership assets, then complainants have no right to it until there is a settlement of the partnership accounts. If the fund belonged jointly to Mrs. Aiken and J. H. Hastie, then the remedy at law is complete, and, in whatever way we regard the bill, it is without equity. There was no evidence to support the allegations of the bill, and yet the Chancellor makes a decree on the merits of the cause. This can not be supported.

COBBS & TOMPKINS, for Williams.—The bill was barred by the statute of limitations of six years.—43 Ala. 201. Clara Aiken, as surviving partner, took the whole interest in the fund in the hands of Williams & Son, and, as the bill is filed too late to force a partnership settlement, it is without equity and should be dismissed.—49 Ala. 212; 1 Wm's on Ex'rs, 115. If Williams & Son are liable to any one, it is to the administratrix of the surviving partner.—8 Wheat. 669; Collyer on Part. § 666. The liabilities of Williams & Son in this case are only such as the law imposes on them. They hold the money to pay it to whomsoever it may belong.—*Martin v. Br. Bank Decatur*, 31 Ala. 131.

THOS. H. PRICE, and CLOPTON, HERBERT & CHAMBERS, for appellees.—Under the agreement of the parties, and the facts

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shown in this case, the statute of limitations could never run against the rights of complainants, or their testator.—*Causler v. Wharton*, 62 Ala. 358; *Bradford v. Spyker*, 32 Ala. 134; *Cannon v. Copeland's Adm'r*, 43 Ala. 201. A *cestui que trust* can not set up the defense of the statute of limitations against his *co-cestui que trust*.—*Foscue v. Foscue*, 2 Iredell, 321. This doctrine is approved in 2 Perry on Trusts, 863. The possession of the trustee is the possession of each and every *cestui que trust*. This bill was not filed to settle partnership accounts, but to determine the ownership of a particular fund. Complainants will offer to prove enough of the partnership dealings to show themselves entitled to the trust fund. This evidence is certainly not barred by any statute of limitations.

SOMERVILLE, J.—This is not properly a bill for the settlement of partnership accounts of the firm of Aiken & Hastie. If so, the plea of the statute of limitations of six years, might be a sufficient answer to the case made by the bill, unless it come within the principle decided in *Causler v. Wharton*, 62 Ala. 359, which is immaterial to be decided. We may concede that the lapse of six years from the date of dissolution, ordinarily, and as a general rule, operates to bar a suit in equity for the settlement of partnership accounts. *Bradford v. Spyker's Adm'r*, 32 Ala. 134.

The complainant in the bill does not pray for any decree or relief against the defendant, based on any balance due on such settlement. Such claim is expressly renounced, and all redress founded on it is directly repudiated. It is the recovery and enforcement of such a personal decree that statutes of limitations are held to legally bar. They affect the remedy, rather than the right.—2 Brick. Dig. p. 217, § 1.

The contention here is a trust fund—an amount of money over five thousand dollars—deposited, by special agreement, in the Bank of Mobile, under the management of Price Williams & Son, who were constituted trustees for its investment, until the claimants could settle their relative rights to it by agreement or litigation. This is not a trust raised by implication of law, such as comes within the operation of the statute of limitations. It is an express and continuing trust, created in writing, against which time would not, in general, commence to run until the trustee disavows and repudiates his trust, and such conduct, or disavowal, is brought to the knowledge of the *cestui que trust*. It is the maxim of honesty, as well as of settled law, that no trustee, while occupying his position of trust and confidence, should be heard to lay claim to the trust fund by setting up an adverse



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title.—2 Perry on Trusts, § 863; 2 Brick. Dig. p. 217, § 10; 7 Wait's Act. & Def. p. 269, § 22.

And as the possession of the trustee is, in law, that of each beneficiary, of whom he is the fiduciary agent, it is also settled that one *cestui que trust* can not set up the statute of limitations against his *co-cestui que trust*, unless, perhaps, under such circumstances as would authorize the trustee himself to make such defense.—2 Perry on Trusts, § 863; Hill on Trustees, p. 390; *Foscue v. Foscue*, 2 Ired. 321. The defendants, therefore, were precluded from undertaking to set up any right to this fund, claimed to have accrued by mere bar of time. The demurrer, interposing the statute of limitations, was properly overruled. The complainant was entitled to introduce any legal evidence showing the relative ratio of ownership of the claimants in the disputed fund. The statute of limitations never bars the introduction of *evidence*, for a deed may be so old that it is admitted as an ancient document without preliminary proof of its execution. The state of the partnership accounts necessarily determines the *proportion* of the trust fund to which the beneficiaries are severally entitled. It is the mere *incident*, and not the *gravamen* of the suit. The decree of the Chancellor ordering the register to take such an account was, therefore, correct.

The decree of the Chancellor settled all the *equities* between the parties litigant, and there remained only a reference to be had, in order to ascertain their ratio of interest in the disputed fund. The decree was, therefore, final, and will support an appeal to this court.—1 Brick. Dig. p. 89, § 85, and cases cited.

The above views of this case render useless the consideration of the other grounds of demurrer, which are based upon the erroneous theory that the suit is an ordinary one for the settlement of partnership accounts, and that the trust created is not an express one.

The decree of the Chancellor is affirmed.

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## Cruikshank v. Luttrell.

### *Bill in Equity for Discovery and General Relief.*

1. *Personal representatives take no interest in the lands of testator or intestate.* Personal representatives, although they have statutory powers and duties as to the lands of the decedent, take no interest in them, but *eo instanti* his death they descend to the heir, or pass to the devisee, subject only to the exercise of the statutory powers of the executor or administrator.

2. *Heir or devisee; rights in the lands of testator or devisor.*—The heir or devisee, is entitled to the possession of the lands, and to the rents and profits, until the personal representative asserts his statutory powers, and may alien them, subject to, and not frustrating the exercise of these powers.

3. *Powers of personal representative; how exercised.*—The powers of the personal representative over the lands of the testator, or intestate, are entirely statutory, and must be exercised and executed as the statute directs, and an exercise of them in any other mode, cannot convey any rights, or relieve the executor or administrator from liability.

4. *Same; what powers personal representative has over lands of deceased.*—The personal representative may rent the lands of the estate, or may sell them under the decree of the Probate Court for the payment of the debts of the testator, or intestate, when the personalty is insufficient for that purpose, or to effect an equal distribution among the heirs or distributees.

5. *Personal representative; duties of as to sales of land.*—Whether the sale is to pay debts, or for distribution, the personal representative must secure the purchase-money by taking two sufficient sureties, and report the sale within sixty days to the Probate Court.

6. *Sale of lands of deceased person; duty of Probate Court as to.*—The Court of Probate must examine the report of sale, and also examine witnesses with reference to it, and if the sale was not fairly conducted, or the amount bid for the land was greatly less than its real value, the sale should be vacated, or, if the sureties for the purchase-money are insufficient the sale should not be confirmed until sufficient security is given, but if the sale is vacated, the court must order a resale of the lands, to be advertised, and conducted in all respects, as was the first sale.

7. *Same; no valid sale unless court prescribes place.*—When lands of an estate are decreed to be sold by the Probate Court, the court must determine the place of the sale, and if no place is fixed by the court the personal representative cannot select it, and no valid sale can be had.

8. *Same; when confirmed and deed made.*—If the Probate Court is satisfied that the sale was fairly conducted, that the land brought a sum not greatly less than its real value, and that the purchase-money is sufficiently secured, it must confirm the sale; but the purchaser cannot obtain a deed until the sale is confirmed, the purchase-money paid, its payment reported to the court, and the personal representative ordered to execute the conveyance.

9. *Same; sales by personal representative of, under decree, are judicial.*—Sales of the lands of estates by the personal representative, under the decrees of the Probate Court, which fixes the place and terms of sale, and which are subject to confirmation by it, are essentially and strictly judicial. The court is the vendor, and the executor or administrator merely the agent or officer through whom the sale is made.

10. *Same; sale not changed by personal representative.*—When a sale of the lands of an estate is made by a personal representative, under the orders of the Probate Court, he cannot change or vary the terms or conditions of sale, or enter into any new or other contract with the purchaser.

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11. *Same ; in whom is title until conveyance.*—The legal title to lands sold under the orders of the Probate Court, remains in the heir or devisee, until a conveyance is executed to the purchaser, under the decree of the Probate Court, and they may until that time recover the possession from the purchaser by ejectment.

12. *Same ; executor or administrator, and purchaser, cannot rescind sale made under the order of the Probate Court.*—When an executor sells lands of his testator, under the order of the Probate Court, the heirs or devisees acquire rights thereby, and an agreement made afterwards between the executor and the purchaser, by which it is intended to rescind the sale, and absolve the purchaser from the payment of the purchase-money, is inconsistent with the nature of the sale, with the statutes regulating it, with the principle which prevents the representative from binding the estate by his contracts, and is void.

13. *Same ; cannot be resold by the representative without an order of court.*—In such a case, after an attempted rescission of the sale, the power to resell resides in the court, and the personal representative cannot resell, except by its order, and an attempted resale by him is void; the original sale remains valid, and a succeeding administrator or executor may enforce payment of the purchase-money.

14. *Same ; Probate Court has no jurisdiction to confirm void sales of.*—The Probate Court, as to the sales of the lands of estates, is of limited, statutory jurisdiction, and has no authority to confirm void sales made by a personal representative.

15. *Personal representative may take lands in payment of debts.*—Executors and administrators may, being responsible for any loss caused thereby, take lands in payment of, or in compromise of, debts due the estates they represent, but the rights of heirs or devisees immediately attach, and can only be divested by their consent, or by a judicial proceeding to which they are parties; and while adult heirs or devisees may elect to keep the land, such an election can only be made for infants by the Chancery Court.

16. *Parties ; decree on merits ; when not affirmed for want of.*—When the complainant is entitled to relief, but the Chancellor dismissed the bill on the merits, the decree will not be affirmed for want of proper parties, no objection on that ground having been made in the court below—but the case will be reversed and an opportunity given him to amend.

17. *Appellant taxed with costs when defect in his bill prevents decree in his favor.* When a defect in his bill prevents the rendition of a final decree in favor of the appellant, he will be charged with the costs of appeal.

## APPEAL from Talladega Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill filed on the 20th of September, 1875, by Marcus H. Cruikshank, as administrator *de bonis non*, with the will annexed, of the estate of Thomas Merritt, deceased, against William C. Luttrell. Thomas Merritt died in Green county, Georgia, leaving a will, of which he appointed his son, Benjamin Merritt, the executor. Letters testamentary were granted to said Benjamin Merritt by the Probate Court of Talladega county, and on the 1st day of October, 1860, that court granted him an order to sell certain lands situated in Talladega county, for the purpose of effecting an equal distribution. The executor sold the land under this order, and Franklin Merritt became the purchaser, and executed his notes for \$3,320, payable November 5, 1861, with two sureties, for the payment of the purchase-money, and this sale was confirmed by the Probate Court. But Franklin Merritt



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being unable to pay the notes when they became due, on February 20, 1864, transferred to the executor the certificate of purchase, which had been given him at the sale, and received in return his notes for the purchase-money. On the same day the executor resold the lands, at private sale, to William C. Luttrell for \$3,626, to be paid as follows: \$1,000 cash, \$1,326 on February 20th, 1863, and \$1,326 on February 20th, 1864. He also gave Luttrell, the appellee, a bond conditioned to make titles to him on the payment of the purchase-money. The purchase-money was paid by Luttrell, and the executor reported this fact to the court, on November 17, 1863. The court thereupon ordered the executor to make a deed to the land to Luttrell, "the certificate of purchase having been transferred to him, and the sale having been previously confirmed." The defendant, Luttrell, in his answer to the bill, insisted that he had been merely substituted as the purchaser of the land by the executor; and that this was done by the executor in order to collect the purchase-money, which Franklin Merritt was unable to pay. The prayer of the bill was, "that an investigation may be had of the matters and things charged in the bill, and that on the final hearing your honor will grant such general relief as to equity and good conscience seemeth proper." The Chancellor rendered a decree on the merits, dismissing the bill, and this decree is assigned as error.

LEWIS E. PARSONS, for appellant.

M. J. TURNLEY, for appellee.

BRICKELL, C. J.—An executor or administrator is, by the statutes, clothed with powers and charged with corresponding duties in reference to the lands of the testator or intestate, but in them he takes no right or title, interest or estate. As at common law, if devised, the lands pass to the devisee, or if not devised, descend to the heir at law, *ec instanti*, the death of the ancestor, subject only to be interrupted by the exercise by the personal representative of the powers conferred by the statutes. Until an interruption by the personal representative the devisee or heir is entitled to possession, and to take the rents and profits.—1 Brick. Dig. 935-6, 7, §§ 316, *et seq.* The heir or devisee may alien the lands, the alienation being subject to and not frustrating the statutory powers of the personal representative.—*Leavens v. Butler*, 8 Port. 381-390; *Bell v. Craig*, 52 Ala. 215.

The powers of the personal representative being derived wholly from the statutes, must be exercised and executed as

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they direct. They cannot be exercised and executed in any other mode so as to confer rights, and to relieve the personal representative from liability.—*Martin v. Williams*, 18 Ala. 190; *Chighizola v. Le Barron*, 21 Ala. 406. The powers are to rent lands, or to make sales of them under the decree of the court of probate. A decree may be obtained for the sale of the lands, for either of two purposes: *first*, to pay the debts of the testator or intestate, when there is a deficiency of personal assets; *second*, to effect an equal distribution to the heirs or devisees. Whether the sale is decreed for the payment of debts, or for distribution, the executor or administrator is required to secure the purchase-money by taking the notes or bonds of the purchaser, with at least two sufficient sureties.—Code of 1876, § 2461. The Court of Probate must determine the place at which the sale is to be made.—Code of 1876, § 2462. If the place is not fixed by the court, no power exists in the personal representative to select it, and no valid sale can be made.—*Brown v. Brown*, 41 Ala. 215. Within sixty days after the sale, the personal representative must make report thereof to the Court of Probate, and it is the duty of the court to examine the report, and examine witnesses in reference to it. And if it appears the sale was not fairly conducted, or that the amount bid is greatly less than the value, the duty of the court is to vacate the sale. Or, if it appears the sureties for the purchase-money are insufficient, the sale cannot be confirmed unless sufficient sureties are given. In either event, it is the duty of the court to order a re-sale of the lands, which *must be advertised and conducted in all respects* as the first sale. Code of 1876, §§ 2463-64-65-66. But if the court is satisfied the sale was fairly conducted, and the amount for which the land was sold, was not greatly less than its real value, and the purchase-money is sufficiently secured, it must make an order of confirmation.—Code of 1876, § 2467. After the confirmation, the purchaser cannot obtain a conveyance, until all the purchase-money is paid; and the fact of payment must be reported to the Court of Probate, and the conveyance executed under the order of the court.—Code of 1876, § 2468.

It results from these statutory provisions, that sales of lands made by executors or administrators, under decree of the Court of Probate, are essentially, and strictly *judicial*. They are not only made under the decree and authority of the court, which prescribes the place and terms of sale, but they are subject to confirmation or vacation by the court. Until confirmed the sale is incomplete—it rests in negotiation—the bid of the purchaser is a proposition the court may

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accept, or may reject, if the sale has not been fairly conducted in obedience to its decree, or if the price is disproportioned to the value of the lands, or if the proposed sureties for the payment of the purchase-money are insufficient. The court is really the vendor—the executor or administrator, its agent, or officer, through whom the sale is made. *Perkins v. Williams*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210; *Hutton v. Williams*, 35 Ala. 503; *Bland v. Bowie*, 53 Ala. 152; *Force v. McKenzie*, 58 Ala. 115; *McCully v. Chapman*, *Id.* 325. If the purchaser submits to a confirmation, the fraud or misrepresentation of the administrator at the time of the sale, as to the quality of the lands, or as to the character of the title, inducing the purchaser, will not furnish a defense against an action for the recovery of the purchase-money. If such a defense were allowed, it would operate in a collateral proceeding the change of the terms, or the rescission of a sale, confirmed by a court having exclusive jurisdiction of the subject-matter.—*Fore v. McKenzie*, *supra*. There can be no change of the terms and conditions of sale as prescribed by the decree of the court, made by the personal representative. He has not authority to vary them, or to enter into any new or other contract with the purchaser. *McCully v. Chapman*, *supra*. After confirmation by the Court of Probate, the purchaser may be let into possession, but the sale remains *in fieri* until the purchase-money is paid, the fact of payment reported to the court, and a conveyance decreed by the court and executed—the conveyance by the terms of the statute passing “all the right, title, and interest which the deceased had in the lands at the time of his death.” Until the conveyance is executed under the decree of the court, the legal estate remains in the heirs or devisees who may maintain ejectment, and at law recover possession from the purchaser.—*Doe v. Hardy*, 52 Ala. 291. After the confirmation of the sale, there can be no rescission of it by decree of a court of equity in any suit, or upon any ground, unless the heirs are parties.—*Lumpkin v. Reese*, 7 Ala. 169; *Bland v. Bowie*, *supra*; *McCully v. Chapman*, *supra*. The personal representative is consequently without authority by any agreement with the purchaser to rescind or to modify the terms and conditions of sale. All his powers in reference to lands are statutory, and the capacity or authority to modify or rescind is not conferred. The exercise of such power involves the undoing of that which a court of competent jurisdiction has ordered, and confirmed as well done. He may collect the notes given for the purchase-money, and he has the same authority in the reduction of them to money for the purposes of administration, that he has over other choses



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in action held by him as assets.—*Hutchinson v. Owens*, 59 Ala 326; *Van Hoose v. Bush*, 54 Ala. 342. But this does not involve the power of rescinding the sale.

The agreement between Franklin Merritt, the purchaser of the lands, and the executor, Benjamin Merritt, by which it was attempted and intended to rescind the sale of the lands, and to absolve the vendee from liability to pay the purchase-money, was in excess of the authority of the executor, and void. It was not in their power to rescind the sale. By it, the heirs or devisees had acquired rights and interests which the executor could not impair or divest, and which no court would have affected without their presence as parties. The re-sale of the lands by the executor to Luttrell was, if possible, more palpably in excess of authority and duty. No court would have ordered other than a public sale of the lands—before a public sale could have been made, the place of sale must have been appointed by the court and the terms prescribed. The power of confirming or vacating the sale, the law reserves to the court, and, before confirming, the court must be satisfied of the sufficiency of the price and of the sureties for its payment. Of what avail are all the statutory provisions intended for the benefit and protection of heirs and devisees, who by a judicial proceeding only can be divested of their estate in lands, if the personal representative can, at his election, disregard them? The court of probate had confirmed the sale of the lands to Franklin Merritt, who had given sureties for the payment of the purchase-money the court approved. After the purchase-money was due and payable, the executor privately re-sells the lands to Luttrell, postponing the payment of a part of the purchase-money for more than two years, and taking but one surety for its payment. This whole transaction was void, from its inception to its consummation. In *Matthews v. Dowling*, 54 Ala. 202, which was a bill in equity by a vendor to rescind a sale of lands made by administrators under a decree of the court of probate, the administrators consented to the rescission. This court said: "The consent of the administrators to the rescission is not of importance. They were powerless to divest the heirs of the interest in the lands descending to them, and, if they had power to consent, a court of equity should never have acted on such consent, when it was not shown that they were securing a benefit to, rather than impoverishing the estate they represented."

Nor can the transaction be aided by the decree of the court of probate confirming it, if the decree is of confirmation. In reference to the sales of lands, the court is essentially of limited, statutory jurisdiction. It has only such

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jurisdiction as the statutes may confer; and there is no statute which confers jurisdiction to confirm void or unauthorized sales of lands made by the personal representative. 1 Brick. Dig. 439, § 172. If the jurisdiction existed, it could be exercised only in a proceeding to which the heirs or devisees were parties, for the effect of the proceeding is to disseize them. The heirs or devisees are parties to all regularly conducted proceedings in the court of probate, for the sale of lands, and remain as parties until the rendition of the final decree ordering a conveyance. But this is true only when the proceedings are kept within the bounds prescribed by the statute. It is not true that they are to be regarded as parties to, or having any notice of, any and every proceeding which may be instituted in connection with the proceedings for sale, for which the statutes make no provision, and which they could not anticipate. This decree of the court of probate was *ex parte*, the heirs were without notice of it, and it is wanting in every element of a judicial proceeding, except that of form.—*Lamar v. Gunter*, 34 Ala. 324.

The Chancellor seems to have supported the transaction as a mere expedient adopted by the executor to collect the debt for the purchase-money of the lands, due from Franklin Merritt. We do not doubt that an executor, or administrator, if a necessity for it exists, and of the necessity he determines largely upon his own responsibility, may take lands in payment of debts due him in his representative capacity, as he may take a mortgage of lands as security for the payment of such debts.—*Foscoe v. Lyon*, 55 Ala. 455. But if he takes land in payment of debts, the rights of heirs or devisees at once attach, and of them they can be divested only by their consent, or by some judicial proceeding to which they are parties. If *sui juris*, they may elect to keep the lands rather than have it converted again into personal property—and if not *sui juris*, an election for them can be made only by a court of equity. The statutes passed since this transaction provide that when an executor or administrator receives real estate in payment, or in compromise, of a debt, if a sale thereof is necessary to effect distribution or to pay debts, the sale must be made under an order of the court of probate, just as if it was lands descended or devised, (Code of 1876, § 2507), thus sanctioning the view we have expressed. Treating this transaction as the Chancellor was inclined to regard it, would not render the sale to Luttrell valid—that would remain a violation of duty, and an usurpation of authority by the executor. But this is not the true character of the transaction, nor is it what the parties contemplated and supposed they had accomplished. They in-

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tended the rescission of the sale to Franklin Merritt, and a re-sale by the executor, privately, without an order of the court of probate, to Luttrell, on terms different from the terms of sale prescribed originally by the court. This they were incapable of accomplishing, and the sale to Franklin Merritt, confirmed by the court of probate, remains valid. The purchase-money is yet owing by him, and is unadministered assets, the right and title to which vests in the appellant as administrator *de bonis non*.—*Swink v. Snodgrass*, 17 Ala. 653. Further, it must be observed, that whenever a re-sale of lands is authorized by the statutes, it is provided the re-sale must be made under the decree of the court. All power in the personal representative to re-sell is withheld. Code of 1876, §§ 2466, 2668, 2669. And throughout the decisions of this court, the proposition is asserted, and rigidly maintained, that a personal representative can not by his contracts or agreements bind the estate he may represent. 1 Brick. Dig. 957, § 614. A power in the personal representative, by an agreement with the purchaser, to rescind a sale of lands made under a decree of the court of probate, is inconsistent with the nature and character of the sale, with the statutory provisions governing and regulating it, and with the general principle which denies him power, by his contracts, to bind the estate. A re-sale by him is manifestly in conflict with the law—he has no right or title, estate or interest to sell, and the power of re-sale resides only in the court of probate.

The equity of the appellant is to enforce a lien on the lands for the payment of the purchase-money, due from Franklin Merritt. But the bill is defective for the want of parties, and until the proper parties are before the court, relief can not be granted. Franklin Merritt, and the heirs and devisees of the testator, in whom resides the legal estate in the lands, are indispensable parties. In the court of chancery the whole contest was limited to the equity of the bill. There was no demurrer, or objection otherwise made for the want of parties. The Chancellor considered and passed only on the merits of the case as shown by the pleadings and evidence, decreeing an unqualified dismissal of the bill. In this state of the case it would be manifest injustice to affirm the decree because of the want of proper parties, when if objection had, at any time before final decree, been made on this ground, it would have been removed by amendment. The ends of justice are best accomplished by reversing the decree of the Chancellor, and remanding the cause, with directions to allow the complainant to amend the bill as he may be advised.—*House v. Mullen*, 22 Wall. 42. The



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defect in the bill is the fault of the appellant, preventing the rendition of a final decree, and protracting the litigation; and he must pay the costs of this appeal in this court and in the court of chancery.

Reversed and remanded.

## Newbold v. Smart.

*Bill in Equity by Tenant in Common, against Co-tenant, to enforce Lien on common property for over-payment of purchase-money.*

1. *Tenant in common; has lien on land for excess of payment of purchase-money above his share.*—Where two purchasers of land take a conveyance in their joint names, thereby becoming tenants in common, by force of the statute, (Code, § 2191), and jointly execute a mortgage on the lands, to indemnify their surety on the purchase-money note; if one pays more than his proportion of the debt, he has an equitable lien, for the excess, on the interest of his co-tenant in the land.

2. *Same; not liable to each other, for use and occupation.*—Tenants in common are seized *per my et per tout*, and each has an equal right to occupy the premises; and unless the one in actual possession, denies the other the right to enter, or agrees to pay rent, nothing can be claimed for such occupation.

3. *Same; unequal occupation by one, simple contract debt, creating no lien.*—If one tenant in common owes another for unequal use and occupation of the common property, it is a simple contract debt, and creates no lien on the land.

4. *The right of homestead does not prevail against valid liens.*—The right of homestead does not prevail against valid liens, and cannot be asserted by one of two tenants in common against the other's equitable lien, for an excess of purchase-money paid by him, over and above his share.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in Chancery, filed on the 20th day of August, 1877, by Jas. F. Smart against Robert E. Newbold. The bill alleged, that on November 12, 1873, complainant and said Newbold purchased certain lands at administrator's sale, agreeing to pay \$600 for them; that being unable to pay cash, they procured J. P. Martin & Co. to endorse their notes for the purchase-money, which were then accepted as cash by the distributees of the estate; that the probate court confirmed the sale to them, and the administrator, by decree of the court, executed a conveyance to them; that they executed a mortgage on the lands to J. P. Martin & Co., to secure them against loss by reason of their endorsement on the notes; that said Martin & Co., who were engaged in buying and selling hides, agreed with complainant, who was engaged

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in business as a butcher, that they would take from him in payment of the mortgage debt hides, tallow, &c.; that in accordance with this agreement complainant delivered hides, tallow, &c., to Martin & Co. until September, 1876, when he received an account from them showing that there was a balance of \$167.50 still due on the debt; that complainant disputed the correctness of this account, and Martin & Co. proceeded to advertise the property for sale under the mortgage; that Newbold, who had been in exclusive possession and enjoyment of the property, and who had agreed to pay one-half the purchase-money, but who had not paid anything up to this time, paid said sum of \$167.50 to Martin & Co., and the mortgage was then cancelled; that said sum of \$167.50 was not due on the mortgage debt. The bill prayed that an account might be taken of what they, Newbold and Smart, had each paid on the mortgage debt; that Newbold be charged with interest on that portion of the purchase-money paid by complainant for him, and with the rent received by him from the property, and interest thereon; that an account be taken as to whether the said sum of \$167.50 was due to Martin & Co.; that a lien in favor of the complainant, be declared on the land for the amount thus ascertained to be due by said Newbold; that his interest be sold and the complainant put in possession of the land. Newbold answered, admitting the allegations of the bill, as to the purchase of the land, to be true, and averred that he was for a short time engaged in the butchering business, as a partner of Smart's; that the value of the hides to be furnished Martin & Co. was not to be credited on the mortgage debt; that it was not understood, or expected that Martin & Co. would have the notes to pay at maturity; that respondent and Smart, being partners, furnished Martin & Co. with hides to the value of about \$200; that Martin & Co. had paid for the greater part of the hides in money; that the account of Martin & Co. with Smart, showing a balance due of \$167.50 was correct; that respondent had paid this balance; that he had paid half the purchase-money; denied that he had enjoyed the use of more than one-half the property; denied that he owed Smart for any rent, and pleaded that he was in possession, owning, and occupying one-half of said land, as his homestead, and that it was exempt to him, as such, under the constitution and laws of the State. He also demurred to the bill on the ground that the claim set up therein, was a mere debt for which the complainant had no lien on the lands. The Chancellor rendered a decree overruling the demurrer, and declaring the plea of homestead insufficient. He also decided on the evidence that the par-

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ties were partners in the butchering business at the time of the purchase, and for a short time afterwards; and that the hides delivered to Martin & Co. during that time should be credited on joint account; that the register take, and state an account of the amount of purchase-money paid by each party, and of the rents, allowing credit to Newbold for the value of one-half the hides furnished Martin during the partnership, and the \$167.50 paid by him. The register reported that there was a balance due Smart, on account of the purchase-money overpaid, and the rents, of \$835.97, and that the respondent was indebted to complainant, Smart, to the amount of \$304.02; being half the difference between \$835.97, the amount paid by Smart, and \$227.93, the amount paid by Newbold. The defendant excepted to the register's report, because in making up the account he charged Newbold with the rental value of all the land. 2. Because Newbold was charged with \$350, the entire amount of the rent, as part of the purchase-money of the land. The respondent also moved to dismiss the bill for want of equity. The Chancellor in his final decree overruled this motion, confirmed the register's report, decreed a lien on the land in favor of Smart for \$304, the amount ascertained to be due by the register, and also decreed a sale of the land to satisfy the debt. The errors assigned are, overruling the demurrer to the bill, denying the motion to dismiss for want of equity, overruling the exceptions to the register's report, and decreeing the land to be sold.

S. CROOM, for appellant.—If anything was due from Newbold to Smart it was a mere debt, for the payment of which Smart had no lien which is recognized in equity.—*Foster v. Trustees*, 3 Ala. 302; *McKay v. Green*, 3 John. Ch. Rep. 56; *Notte's Appeal*, 45 Pa. St. 361. There was not even a resulting trust in favor of Smart, because the money was not paid at the time the title was taken.—*Preston & Stetson v. Miller*, 53 Ala. 84. Newbold had a homestead in this land which the decree of the Chancellor should have recognized and protected.—*McGuire v. Vanpelt*, 55 Ala. 359. The register, in stating the account, blended the purchase-money with the rents, and it is well settled that a tenant in common is not liable for rent to his co-tenant, even though he occupies the whole property, unless he has agreed to pay rent.—*Lockhart v. Lockhart*, 16 Ala. 423; *Viner's Abridgment*, Joint Tenants, 525.

BOYLES & OVERALL, for appellee.—Partners in the purchase of lands have an equity against each other for the pur-



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pose of producing equality among themselves, and this equity fastens itself, and is a lien upon their respective interests. *Pearl v. Pearl*, 1 Cooper's Ch. Rep's. (Tenn.) 206; *Lorimer v. Lorimer*, 6 Madd. (E. C.) 223; *Yates v. Pemberton*, 3 Cald. (Tenn.) Equity will hold the common property bound for an excess in the sum paid by one tenant in common, over the other.—*Rankin v. Black*, 1 Head. 600; *Gee v. Gee*, 2 Sneed 402. A tenant in common who pays taxes on the common property, is entitled to a lien until he is reimbursed.—42 Iowa, 36. So also, for incumbrances removed.—*Fitsworth v. Stout*, 49 Ills. 78. The amount due from Newbold for rent stands on as high a plane of equity as the claim for the purchase-money, for both arises out of the joint purchase, and it is inequitable to permit Newbold to enjoy the exclusive enjoyment of the property. The plea of a homestead in the land was properly decreed to be insufficient. A man must first acquire a homestead—must own the property, and free it from prior incumbrances, done or suffered by him, before he can claim it as such. See, in this connection, *Shepherd v. White*, 11 Tex. 354; *Stone v. Parnell*, 20 Tex. 14.

STONE, J.—In *Foster v. Trustees of the Athenæum*, 3 Ala. 302, this court decided, that “a surety of a vendee, who is compelled to pay the purchase-money, has no lien in equity upon the land” for reimbursement. The reason given was, that by the payment of the debt on which he was surety, the instrument evidencing the debt became *functus officio*. In other words, that the debt, to which the lien attached as an incident, ceased to exist when it was paid; and left nothing to which the lien could stand as an incident. The principle of that case has never been departed from, but has been frequently cited approvingly.—*Chapman v. Abraham*, 61 Ala. 108. It is not our intention to enter into discussion of that case, nor of the principle on which it was said to rest.

The present case is different in its facts. Smart and Newbold, complainant and defendant, jointly purchased the lands brought to view in the present proceedings. They purchased on credit, received a conveyance in their joint names, and John P. Martin & Co. became their endorsers and sureties for the payment of the purchase-money. They executed a joint mortgage of the purchased premises to John P. Martin & Co. to bear them harmless against their said indorsement. Smart claims, and shows, that he paid more than half the purchase-money, and this bill is filed to enforce a lien on Newbold's undivided interest, for the excess of payments over one-half, paid by Smart. Smart claims he has such lien, growing out of the facts of this case. The lien is denied by

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Newbold, and he claims that the premises are exempt to him as his homestead. It is clear that, under the facts attending this purchase, and the payment of the purchase-money, Smart and Newbold became tenants in common of the premises under our statute, which converts all joint tenancies into tenancies in common.—Code of 1876, § 2191. *Rankin v. Black*, 1 Head, (Tenn.) 650, was a case of joint purchase of land, and unequal payment of the purchase-money. The court said: "Where the adventure is joint, each is entitled to participate equally in profit or loss, without regard to equality in payment. But it is a clear principle of equity, that the common property will be held bound for any excess paid by one over the other. It is analagous to the law of partnership, by which, as between the partners, the capital must be recognized out of the partnership effects, before the profits can be divided." The complainant, in that case, has claimed that he was entitled to an excess of the land, commensurate with the excess of payment he had made above a moiety. In *Gee v. Gee*, 2 Sneed, 395, the same court said, speaking of a case of joint and equal purchase: "In the adjustment of accounts between themselves, the matter must be equalized; and the land, with the proceeds, if sold, would be held barred by a court of equity for the excess paid by either, above his one-half of the consideration." In *Titsworth v. Stout*, 49 Ill. 78, it was ruled, that "where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and, to secure such contribution, a court of equity will enforce upon such interests an equitable lien, of the same character with that which has been removed by the redeeming tenant." The same principle was declared in *Fisher v. Allen*, 52 Ill. 379. In *Oliver v. Montgomery*, 42 Iowa, 36, it was held, that a co-tenant, who paid the taxes upon the property held in common, was subrogated to the State's lien on the property, and could enforce such lien for his own reimbursement. In 1 Jones on Mort. § 878, is this language: "If one joint mortgagor, in order to protect his interest, pays the joint debt, he is subrogated to the interest of his joint mortgagor, until he is repaid." *Owen v. McGehee*, 61 Ala. 440, was a joint purchase of a tract of land by four, with an agreement to divide in certain proportions, each to pay in proportion to the quantity of land he obtained. The purchase was made in Owen's name, but they executed a joint note for the purchase-money. Owen paid more, and McGehee less than his proportion. On bill by Owen, it was decreed, that he had a lien on the part which fell to McGehee in division, for the unpaid portion which McGehee should

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have paid. In this case, the title had been taken in the name of Owen. The Chancellor rightly ruled, that Smart had a lien on Newbold's half interest in the lands, for the sum of the mortgage debt, he, Smart had paid, over and above his moiety.

The claim against Newbold, for unequal use and occupation by him, stands on a different footing. If it were true that Newbold owes Smart for that use, it would, at most, be only a simple contract debt, with no lien whatever on the land for its payment. But, under the averments and proof in this case, Smart shows no claim against his co-tenant for rents, or for use and occupation. Tenants in common are seized *per my et per tout*. Each has an equal right to occupy; and unless the one in actual possession denies to the other the right to enter, or agrees to pay rent, nothing can be claimed for such occupation. Such possession by one is treated as had, with the consent and approbation of the co-tenant. "A mere participation in the profits of land, with a joint occupation, or an occupation which does not exclude the owner from possession, will not amount to a tenancy."—Taylor's Landlord and Ten. § 24. In *Badger v. Holmes*, 6 Gray, 118, the court said: "Nothing is better settled than the rule, that the mere occupation of premises owned in common, by one of the tenants in common, does not entitle his co-tenant to call him to account, or render him in any way liable to an action for the use and occupation of the estate. Each owns the estate *per my et per tout*. If a co-tenant does not see fit to come in and occupy, the other still has the right to the enjoyment of the estate; and in such case, the sole occupation of one, is not an exclusion of the other. Each tenant, being seized of each and every part and parcel of the estate, has a right to the use and enjoyment of it; and so long as he does not hold his co-tenant out, or in any way deprive him of the occupation of the estate, he exercises only a legal right, and receives nothing for which he is bound to account to his co-tenant." To the same effect are the following authorities; *Graham v. Pierce*, 19 Grat. 28; *Israel v. Israel*, 30 Md. 120; *Hutton v. Powers*, 38 Mo. 353; *Everts v. Bench*, 31 Mich. 136; *Bird v. Bird*, 15 Fla. 424; *Campbell v. Campbell*, 21 Mich. 485; *Barrell v. Barrell*, 25 N. J. Eq. 173; *Austin v. Ahearn*, 61 N. Y. 6, 14. In 1 Washb. on Real Prop. 570, [420], is this language: "To render one co-tenant liable to another for rent, or for use and occupation, there must be something more than an occupancy of the estate by one, and a forbearance to occupy by the other. The tenant who merely occupies the estate does no more than he has a right to do on his own ac-



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count." The Chancellor erred in decreeing any relief to complainant on account of use and occupation.

The testimony on the question whether Smart and Newbold were at any time partners in the butchering business, is in direct conflict. The Chancellor found they had been such partners for a brief time, and there is not enough in this record to convince us he erred. His ruling on that question is affirmed.

The question on Newbold's liability for rents is presented, without any reference to exceptions attempted to be filed to the report of the register. The Chancellor, in his decree of reference, instructed the register to inquire into that matter. Moreover, our ruling, in disallowing that charge, is not based on the testimony, on which the register acted. We disallow it, because, under the law, Newbold is not liable to pay it. On all other items of the account we are satisfied with the register's finding. In fact, we do not understand counsel as seriously assailing any other items of the account, save those considered above. The claim set up by Newbold in his answer, that at the time of the purchase Smart was indebted to him, and agreed that that should be estimated in adjusting the burdens of the purchase, fails for want of satisfactory proof. Eliminating from the account the item of \$350 charged against Newbold, for use and occupation, the register's finding and report on the facts is satisfactory to us. The record enables us to make a correct statement of the account, and we will proceed to do so. The register found that Newbold's payments, with interest, amounted to \$227.93. He allowed to Smart, for his payments, including interest, \$835.97. From this should have been deducted \$350, improperly charged against Newbold. The true credit which should have been allowed Smart was, and is, \$485.97. Deducting Newbold's allowance—\$227.93—from this, shows Smart's payments to have exceeded Newbold's by \$258.04; one-half of which, \$129.02, was the true amount Newbold owed Smart as of the day of the report, July 9th, 1878. Instead of decreeing that defendant below—appellant here—was indebted to complainant in the sum of three hundred and four dollars, bearing date July 9, 1878, it should have been one hundred and twenty-nine 2-100 dollars, as of that date.

The decree of the Chancellor is reversed, and a decree here rendered, correcting the register's report so as to show that defendant was indebted to complainant, July 9th 1878, in the sum of \$129.02—and decreeing to complainant, in all other respects, the relief decreed to him by the Chancellor.

Let appellee pay the costs of appeal in the court below and in this court.

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What we have said disposes of the question of homestead, as that right does not exist against valid liens.

Reversed and rendered.

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### *Motion to Amend Judgment Nunc Pro Tunc.*

1. *Nunc pro tunc*; judgments amended without notice.—The practice of permitting judgments to be amended, *nunc pro tunc*, without notice, is established in this State.

2. *Same*; judgment amended so as to show amount.—When, in a suit on a promissory note, which was properly described in the complaint, a judgment was rendered by default, and the docket of the presiding judge showed this fact, the omission to state the amount of the damages is a mere clerical error, its amendment is a ministerial act, and was allowable at common law, even before the statute of Jeofails.

3. *Same*; effect of amending judgments, and what amendments permissible. Judgments are amended *nunc pro tunc*, merely to supply matters of record evidence, not to modify or introduce new facts, and, except as to rights of third persons, are retrospective, and are enforced in the same manner, and to the same extent, as if entered at the time the judgment was originally rendered, so that the right is not affected by the death of a party, or by the fact that the plaintiff in the motion, who was administrator of the plaintiff's estate, had been appointed administrator on the estate of one of the defendants.

4. *Same*; statute of limitations does not run against amendments made.—At common law, the period within which judgments might be amended *nunc pro tunc*, was not limited, and, under our statutes, the right can not be barred before the expiration of twenty years, the time allowed for reviving judgments by *scire facias*.

APPEAL from Shelby Circuit Court.

Tried before Hon. J. E. COBB.

On the 12th day of October, 1877, a motion was made in the Circuit Court of Shelby county by French Nabers, as administrator of the estate of James A. Meredith, against Jerusha Meredith, R. Wood, D. Y. Wyatt, G. E. Harrall, and T. F. Wilson, to amend, *nunc pro tunc*, a judgment rendered at the fall term, 1867, of said court, so as to insert therein the specific amount for which the judgment was recovered. On the hearing it appeared that the suit in which the judgment was rendered was founded on a promissory note, which was described in the complaint. On the judge's trial docket there was this entry, in the handwriting of the presiding judge, viz: "Assumpsit, judgment by default for plaintiff." Several executions, which had been issued on the judgment, were introduced in evidence, and portions of the execution docket were read in evidence, all of which showed

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the amount for which the judgment had been recovered. It was suggested to the court, by Messrs. Cobb, Wilson & Wilson, as *amici curiæ*, that T. F. Wilson, one of the defendants, was dead, and that the movant, F. Nabers, was the administrator of his estate, which fact was admitted to be true. It was also suggested that no service of process was ever made in the original suit on Wyatt, one of the defendants, and that no notice of the motion had been served on any of the defendants. The court denied the motion to amend, and the movant excepted, and assigns this action of the court as error.

HARGROVE & LEWIS, for appellant.—If the clerk omits to insert the amount recovered in entering up a judgment, it may afterwards be amended, *nunc pro tunc*, and the amount inserted.—*Wilkinson v. Goldthwaite*, 1 S. & P. 159. The record in the case just cited is identical with that shown in this case, except that thirty-five years had elapsed in that case, before the amendment was made. Three judgments had been issued on this judgment, and that was sufficient to keep it alive.—3 Ala. 281; Freeman on Judgments, 56. A judgment *nunc pro tunc*, may be entered without notice to the opposite party.—1 Brick. Dig. 72, 18. The fact that one of the defendants had died after the rendition of the judgment, and that one of them was not served with process in the original suit, could not affect the motion.—Freeman on Judgments, 67-8.

WATTS & SONS, for appellees.—The motion being made by French Nabers, as administrator of Meredith, who was also appointed administrator of one of the defendants, who died after the rendition of the judgment, it is in legal effect a motion made by him as administrator of one estate, against himself, as administrator of another estate. To grant such a motion would be to mar the well settled principles of pleading. When Nabers was appointed administrator of Wilson's estate, the law presumes that he paid to himself what was due him as administrator of Meredith, and the judgment was thus satisfied, when this motion was made. Only record evidence could authorize the insertion of the amount of the judgment. The presiding judge did not state the amount in the entry which he made on his trial docket, and the note on file was not record evidence. If the question was simply one of calculating the amount due on the notes, the clerk could have done this, and there was no need of any action by the court. In any aspect of the case, the motion was properly refused. If the judgment be ren-



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dered now, it must be entered against a dead man. How, then, can execution issue? Against him? or against his administrator, who is the plaintiff in this motion?

SOMERVILLE, J.—The practice in this State has been too long and firmly established to be now disturbed, permitting judgments *nunc pro tunc* to be entered without requiring notice to be given to the opposite party. No injustice can result from this rule, for the reason that such amendments are always allowed on some entry or memorandum, which is to be determined from an inspection of the court records, and can not be contradicted or gainsaid by proof of extraneous parol facts. The court erred in refusing to grant the motion for want of notice.—*Glass v. Glass*, 24 Ala. 468; *Allen v. Bradford*, 3 Ala. 281; *Bently v. Wright*, *Id.* 607; *Fugur v. Carroll*, Minor, 170; *Freeman on Judg.* § 64.

The facts appearing on the record authorized the amendment. The suit was on a note of hand properly described in the complaint, and the docket of the court contained a memorandum in the hand-writing of the presiding judge, which showed the rendition of a judgment by default in favor of the appellant against the defendants in the judgment. The omission of the amount of damages was a mere clerical mistake, and its insertion a purely ministerial act, such as was always amendable at common law, regardless of any power conferred by the statute of *Jeofails*.—*Wilkerson v. Goldthwaite*, 1 Stew. & Port. 159.

The right to amend *nunc pro tunc* was not affected by the death of one of the defendants in the judgment, or by the fact that the plaintiff in the judgment had been appointed administrator of the estate of another of the defendants since the date of rendition. Except as to the rights of third parties, all such amendments are retrospective, and are everywhere regarded and enforced exactly in the same manner, and to the same extent, as if entered at the time the judgment was originally rendered or taken. The granting of such motions is merely to supply matters of *record evidence*, and not to modify or introduce new matters of *fact*.—*Freeman on Judg.* §§ 66-68; *Allen v. Bradford*, 3 Ala. 281; *Powell on Appel. Proc.* p. 57, § 34.

It was no legal objection to the motion that over ten years had been permitted to elapse since the original rendition of the judgment. The period within which the power to make such amendments could be successfully invoked at common law was never limited, and, under our statutes, would not be less than the period of time allowed for a judgment to be

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revived by *scire facias*, which is twenty years.—Code (1876), § 3175; Freeman on Judg. § 56; Dan. Chan. Proc. 1219.

The judgment of the Circuit Court is reversed and the cause remanded.

## Elliott v. Stocks.

### *Trial of the Right of Property.*

1. *Agent signing instrument under seal; authority to be in writing, and may be examined as to.*—Authority to an agent to execute an instrument under seal, must be in writing; and where an agent, testifying to his execution of such sealed instrument, states that he had authority to execute it, he may be asked, on cross-examination, if his authority was in writing, and if it is, it should be produced, or its absence satisfactorily accounted for, but in any event he may be cross-examined as to its contents.

2. *Charges; exception to the refusal of several will not reverse unless all correct.* A general exception to the refusal to give several charges, will not avail to reverse the case, unless it is shown that each asserts a correct legal principle.

### APPEAL from Cherokee Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was a suit commenced by an attachment, which was issued on the 19th of July, 1877, at the instance of John T. Stocks, and against H. D. Cothran, Robert Marshall, Thomas McCullough, and W. S. McElwain. The evidence on which this case was tried is substantially the same as that which is set out in the case of Stocks & Bro. against J. M. Elliott, as reported on pp. 291 *et seq.* of this volume. It is unnecessary to repeat it here. The errors assigned, twenty-nine in number, are to the same effect, as those which were made in that case, except as to the charges of the court below, which are stated sufficiently in the opinion of the court.

WATTS & SONS, and COOPER & REEVES, for appellants.

WALDEN & SON, and BRAGG & THORINGTON, for appellees.

STONE, J.—Many of the questions in this cause are settled by our rulings in the case of *Elliott v. Stocks & Bro.*, at the present term.

The instrument under seal of January 1st, 1874, is the written evidence of the contract by which the defendants agreed to operate the property known as the Cornwall Iron Works, in joint adventure. Before that agreement was con-

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summed, the ownership of the property was in Cothran. That agreement let in Marshall, McCullough, and McElwain. Before reading it in evidence, it was necessary to prove its execution. It purported to be signed by Cothran and McCullough in person, with scrolls for seals annexed, and the signature for Marshall was as follows: "Robert Marshall, by his attorney in fact, Thomas McCullough, [Seal]." McCullough was called to prove the execution, and he proved that both Cothran and himself executed it in person. He proved that he executed for Marshall, and that he had authority to do so. On cross-examination he was asked if his authority to execute for Marshall was not in writing. This question was objected to by plaintiffs, and the court sustained the objection. In this the Circuit Court erred. If the authority was in writing, it should have been produced, or its destruction shown, or some other excuse, sufficient in law, given, why it was not produced. And, in any event, it was the privilege and right of the claimant to cross-examine the witness as to the contents of the authority to sign, even if the absence of the writing was sufficiently accounted for. The contract offered in evidence was under seal, and authority to execute and seal it must have been in writing, to be valid.—1 Greal. Ev. § 269.

The Circuit Court erred in suppressing parts of the depositions of the witnesses, Printup and Bowen. What we said in *Elliott v. Stocks & Bro.*, at the present term, will furnish a sufficient guide to the Circuit Court, on another trial of this case, both as to this question, and the questions raised on the testimony of McCullough.

The charges asked and refused were excepted to in the mass, and hence, to avail the exceptor, it must be shown that each asserts a correct legal principle. Charges 1st, 2d and 8th, each and all, seek to raise an immaterial issue. Whether Smith or Foreche, or the Tredegar Iron Works, had any interest in the property in controversy, was not raised by the pleadings, and was immaterial to the rights of these parties, as raised by this record. The 11th charge was rightly refused, because the contract by which Cothran first, and then McElwain, obtained the management of the iron works, did not empower the latter to make a mortgage, or trust deed, binding his co-owners. The 14th charge was rightly refused. The value of the property levied on is a proper subject of inquiry in trials of the right of personal chattels.

Reversed and remanded.



## The City of Selma v. Stewart.

### *Action for Violation of Municipal Ordinance.*

1. *Action for violation of municipal ordinance of city of Selma ; how tried on appeal.*—On appeal to the City Court of Selma, from a judgment of conviction rendered by the Mayor of the city, for a violation of a municipal ordinance, the case is, under the provisions of the city charter, to be tried *de novo*, as in cases of appeals from the judgments of justices of the peace in civil cases, and a motion to quash the proceedings before the mayor, for any defect except a want of jurisdiction, apparent on their face, can not be made for the first time in the City Court.

2. *Proper practice in such cases.*—The proper practice in such cases, to preserve the constitutional right of the defendant to demand the nature and cause of the accusation against him, is to require the plaintiff to file a statement of the case, and all questions as to its legal sufficiency, or as to the jurisdiction, can be raised by demurrer.

3. *Statement ; error to disregard.*—When such a statement is filed, before the trial, it is error to disregard it, and quash the proceedings for defects not raised in the municipal court.

4. *Costs ; municipal corporations not liable for in prosecutions.*—Municipal corporations are not, in any event, liable for costs incurred in prosecutions for the punishment of offenders against their ordinances.

### APPEAL from Selma City Court.

Tried before Hon. JOHN HARRALSON.

On November 29, 1876, an affidavit was made before N. Woodruff, mayor of the city of Selma, charging "that the offense of obstructing the sidewalks of said city had been committed, and accusing H. H. Stewart & Co. of the offense." The warrant of arrest was issued against H. H. Stewart & Co. H. H. Stewart was arrested, tried and fined, and thereupon, carried the case, by appeal, into the City Court under § 62 of the charter, which is set out in the opinion of the court. On January 17th, 1877, H. H. Stewart filed a motion in the City Court to quash the proceedings, the complaint, warrant of arrest, &c., before the mayor. The grounds of the motion were, that H. H. Stewart & Co. were charged with the offense named ; that no individual was accused of such offense ; that defendant's name was not H. H. Stewart & Co. ; that it did not appear in said proceeding what sidewalks were obstructed, nor that it was any offense to obstruct them ; that the warrant which ordered the arrest of H. H. Stewart & Co., was void for uncertainty, and for want of jurisdiction. On January 20, 1877, a complaint was filed by the city of Selma, averring that the defendant "did pile or place goods, &c., on the sidewalks," (describing the location),

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in violation of the following ordinance of said city, (which is then set out in full). On January 22, the City Court sustained the motion to quash the proceedings, dismissed the complaint, discharged the defendant, and taxed the costs against the city of Selma. The errors assigned are, "in sustaining the motion to quash the proceedings, in dismissing the complaint, and in taxing the city with the costs."

SUMTER LEA, for appellant.—The court erred in quashing the proceedings before the mayor. The proceedings in the City Court were governed by the provisions of the law applicable to appeals from the judgments of justices of the peace in civil cases.—Charter of the city of Selma, § 62; Code, 1876, § 3121; *Ganaway v. Mayor of Mobile*, 21 Ala. 577. The judgment against H. H. Stewart was valid.—2 Br. Dig. 161, § 52; *Snow & Co. v. Ray*, 2 Ala. 344; *Ortez v. Jewett*, 23 Ala. 662; see especially *Couch v. Atkinson*, 32 Ala. 633. The court had no authority to render a judgment for costs against the city of Selma.—*City Council of Montgomery v. Foster*, 54 Ala. 62.

BROOKS & ROY, for appellee.—The proceedings in this case before the mayor, acting as a justice of the peace, were *quasi* criminal.—36 Ala. 262; 23 Ala. 222. The rules applicable to pleadings on indictments for misdemeanors are applicable in such cases.—23 Ala. 724; 3 Pick. 461. And no intendments are indulged in favor of such an indictment.—1 Brick. Dig. 498, § 720. The ordinance charged to have been violated must be set out in the complaint and its breach averred with certainty.—30 Ala. 539. The ordinance must be set out in the proceeding before the mayor, for the accused has a right to a copy of the accusation against him.—Const. Ala. Bill of Rights, § 7; 11 Wend. 199; 44 N. H. 284; 5 Cowan, 462. The charter makes the City Court one of appellate jurisdiction, and it is necessary, therefore, to set out the ordinance violated, so that in case of an affirmance, which is also provided for if the defendant does not appear, the court may see whether there is a proper judgment to affirm. It was not necessary to make the objection to the proceedings before the mayor in the municipal court.—20 Ala. 299. If it is held that the case is to be tried *de novo*, that does not affect the judgment in this case, for the trial must be had between the same parties, and the integrity of the case preserved.—9 Ala. 127; 31 Ala. 252. This case could only reach the City Court by appeal, and no new case can be made there on appeal. The charter, § 62, only applies to the mode of getting the case into the City Court, and does not refer to

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the course of the proceedings after it gets before that tribunal, for to hold that they are civil cases would render any judgment punishing a violation by imprisonment entirely nugatory. The complaint which appears in the record was filed after the motion to quash was made, and without leave, and it was not an error to disregard it, or if error, was certainly "without injury."

SOMERVILLE, J.—This is a prosecution originating before the mayor of the city of Selma, acting *ex-officio*, as a justice of the peace, in which the appellee was convicted of "the offense of obstructing the sidewalks," in alleged violation of a municipal ordinance.

An appeal was taken from the judgment of the mayor to the Selma City Court, as specially authorized by the charter incorporating the city.—Session Acts, 1874-75, p. 380, § 62.

This section (§ 62) provides that "the proceedings on such appeal, when the bond is approved by the mayor or councilmen, shall be as prescribed by law in case of appeal from the judgment of a justice of the peace in *civil cases*," except as otherwise required in the charter.

Section 3121 of the Code (1876), prescribes that "all such cases must be tried according to equity and justice, without regard to any defect in the summons, or other process before the justice." This being the case, the trial in the City Court was required to be had *de novo*, on the merits of the case. A motion to quash the proceedings for any mere defect, other than a want of jurisdiction apparent on the face of them, could not be made for the first time in the City Court, and it does not appear that any such motion was made in the trial before the mayor.—*Slaton v. Apperson*, 15 Ala. 721; *Catterlin v. Spinks*, 16 Ala. 467; *McCrary v. Smith*, 1 Ala. 157.

The proper practice, in appeals of this character, has been indicated in *Williams v. Hunter*, 1 Ala. 297. It is to require the plaintiff to file a statement of the case, and thereupon to raise any question as to its legal sufficiency, or the jurisdiction of the justice, by *demurrer*. This preserves, in its full integrity, to the accused, the constitutional right guaranteed to him by § 7, of Art. 1, of the Const., "to demand the nature and cause of the accusation" against him "in all criminal prosecutions."

This statement is shown to have been filed, and sets out, *in hæc verba*, the ordinance of the city alleged to have been violated, but it appears not to have been acted on by the court, or demurred to by the defendant, so far as disclosed by the record. It was error in the court, therefore, to sustain appellee's motion to quash.



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The City Court also erred in taxing the costs of the proceeding against the appellant. It has been repeatedly held, that, in prosecutions of this kind, instituted by municipal corporations for the punishment of offenders against city ordinances, such municipalities are not liable for costs in any event.—*Town of Camden v. Block*, Dec. T. 1880; *City Council of Montgomery v. Foster*, 54 Ala. 62.

The judgment is reversed, and the cause remanded.

## Stocks v. Young.

### *Bill to Redeem Lands Sold under Deed of Trust.*

1. *Bill to redeem; necessary averment in.*—A court of equity will not enforce the statutory right of redemption in lands sold under a power in a deed of trust, when the bill fails to aver that the complainant, before it was filed, tendered the amount of the purchaser's bid, with ten per cent. per annum thereon, and demanded redemption.

2. *Delivery of possession, a condition precedent to the statutory right of redemption.*—It is a condition precedent to the statutory right of redemption, that the debtor shall have delivered possession to the purchaser within ten days after the sale; and a bill which fails to aver distinctly that this provision of the statute has been complied with, is without equity.

3. *Creditor; purchase of at sale of property under trust deed valid.*—A sale of lands under a power contained in a deed of trust to secure creditors, is not voidable at the mere election of the debtor, no fraud, unfairness or inadequacy of price being shown, merely because a creditor became the purchaser.

### APPEAL from Cherokee Chancery Court.

Heard before Hon. H. C. SPEAKE.

This was a bill in equity, filed on the 27th of February, 1880, by Henry Young, against John T., and Wm. H. Stocks, and Wm. McElrath. The bill stated that on February 8th, 1876, Henry Young executed a deed of trust on certain lands, which are described, to secure a debt due to W. H. Stocks, amounting to \$2,204, which was evidenced by two promissory notes, one due December 25, 1876, the other due December 25, 1877; that W. H. Stocks was the beneficiary in said deed, and his brother, John T. Stocks, was appointed thereby, as trustee, to sell the lands in case of default in the payment of the notes at their maturity, and that the deed contained a power of sale to be exercised by said J. T. Stocks. The notes were not paid at maturity, and on March 4, 1878, the trustee sold under the deed, which was in the usual form, and W. H. Stocks became the purchaser of the lands, at the sum of \$2,500, which was at that time the face value of the

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notes, in which was included usurious interest calculated on the notes at sixteen per cent. per annum from their maturity; that said sum was more than was legally due to Stocks, but none of it had ever been paid back to complainant; that at the time of the sale the trustee executed a deed to W. H. Stocks, conveying the property to him, in which was recited the payment of the purchase-money; that said W. H. Stocks entered satisfaction of the mortgage on the records of the Probate Court of Cherokee county, and immediately entered into possession of them; that he held possession of them up to the time of a sale by him to John T. Stocks, and received the rents and profits; that at the time of the execution of the notes to Stocks, complainant did not owe him the amount named in the notes; that this amount was made up of compound and usurious interest; that the debt originated in a land trade between W. H. Stocks and himself; that complainant was an illiterate man, and had the utmost confidence in W. H. and J. T. Stocks; that J. T. Stocks made all the calculations as to the amount due on the notes; that the property in 1872 was worth \$11,000; that on April 20, 1879, W. H. Stocks sold the lands in controversy to John T. Stocks, who sold them on April 23, 1879, to Wm. H. McElrath, who was in possession of them when the bill was filed; that complainant was ready, and willing, and able to pay W. H. Stocks the actual amount legitimately due him on said notes, with legal interest thereon, together with 10 per cent. on the amount that the court should decide he must pay in order to redeem the property, and submitted himself to the jurisdiction of the court. The bill made the same tender and offer as J. T. Stocks, and Wm. McElrath, and prayed that the sale under the trust deed be vacated, that an account be taken of the actual amount due the beneficiary in said deed of trust; that an account be also taken of the amount received, or which might have been received, by him, or his vendees, and the sum credited on the deed of trust. But if the sale should not be set aside, that complainant be allowed to come and redeem. The defendants demurred to the bill, assigning as grounds of demurrer, among others, that the bill failed to show that the complainant delivered the possession of the land to the purchaser within ten days after the sale. The Chancellor overruled the demurrer. The answers of the defendants admitted the execution of the deed of trust, the sale to W. H. Stocks under it, the conveyance to him, and his conveyance to J. T. Stocks, and the sale by the latter to McElrath; averred that the sale was fairly conducted, that there was no fraud, and that the property was not worth \$11,000, but brought its full value at the sale; admitted that

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defendant received 12½ per cent. on the notes as interest after their maturity. The testimony established the facts set up in the answer. The Chancellor rendered a decree vacating the sale under the trust deed, directed the Register to take an account of the rents received by the defendants. The rendition of this decree, as well as the decree overruling the demurrer, is assigned as error.

CLOPTON, HERBERT & CHAMBERS, for appellants.

DENSON & DISQUE, for appellee.—The court did not err in overruling the demurrer. When it was shown that the beneficiary in the deed of trust became the purchaser at the sale by the trustee, it became the duty of the court to set aside the sale, and no injury need be alleged or shown to effect this. *Robinson v. Cullom*, 41 Ala. 693; *Charles v. DuBose*, 29 Ala. 367; *Frazer, Ex'r, v. Lee*, 42 Ala. 25. A beneficiary, under a deed of trust, cannot purchase at his own sale.—*Wade's Heirs v. Harper*, 3 Yerger, 383. The grantor in the deed had a right to redeem.—2 Jones on Mort. 1876; *Rutherford v. Williams*, 42 Md. 33-34. The bill is framed with this view.

BRICKELL, C. J.—1. The objects of the bill are, to vacate the sale of the lands made under the trust deed, because the creditor for whose security it was made was the purchaser, and to let in the grantor to redeem, on taking an account of the debt, excluding usury, which, it is averred, entered into it, and charging the creditor with rents while he and his vendee were in possession; or, if that relief cannot be obtained, to let the grantor in to redeem under the statute. We do not now intend considering whether a bill in equity presenting such alterations can be supported, for it is plain that as a bill for statutory redemption, this bill is wholly insufficient and without equity. There is no averment that before filing the bill the complainant made a tender of the amount of the purchaser's bid, with ten per cent. per annum thereon, and demanded redemption. Nor is there any distinct averment that within ten days after the sale under the trust deed, possession of the premises was surrendered to the purchaser. The purchaser, or his vendee, were not in default, unless a tender of the amount of the bid, with ten per cent. interest thereon, had been made, and a court of equity will not (unless circumstances exist which will excuse the tender), intervene to compel the redemption.—*Spoor v. Phillips*, 27 Ala. 193; *Moore v. Lynn*, 35 Ala. 701. The statute makes it a condition precedent to the redemption, that the debtor must within ten days have delivered possession of



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the premises to the purchaser. Unless the condition is performed, or the debtor remains in possession by the consent of the purchaser, the right of redemption does not accrue. *Sanford v. Ochlatomi*, 23 Ala. 669; *Paulling v. Meade*, *Ib.* 505.

2. There was no irregularity in the sale made by the trustee. All the terms and directions of the power contained in the deed of trust were observed. Nor was there any want of good faith and fair dealing in the trustee, or creditor, attending the sale. There was no oppression of the grantor, no advantage taken of his necessities. It appears very clearly that he was present, approving the sale, declaring to his unsecured creditors, who were making inquiries, that the whole transaction was fair and just. It may be that all sales under powers in deeds of trust, securities for debts, at which the creditor becomes the purchaser, should be closely watched, as should be sales by a sheriff, when the judgment creditor, for whose benefit they are made, becomes the purchaser. There is the opportunity for unfairness and oppression, from which the debtor is entitled to protection. But it is quite an error to suppose that if, at either sale, the creditor becomes the purchaser, the purchase is voidable at the mere election of the debtor, as would be a purchase made by a mortgagee or trustee at his own sale. There is not the relation of trust and confidence, which exists as to trustee and *cestui que trust*, disabling the trustee from acquiring by purchase the trust estate, though he may not take advantage of the relation, and may pay an adequate price, nor is there, as when a mortgagee purchases at his own sale, the conflicting rights and interests of buyer and seller. The disability of either to purchase at his own sale, save subject to its vacation at the mere election of *cestui que trust*, or mortgagor, seasonably expressed, rests upon the broad ground that duty and interest must not be brought into conflict. The creditor secured by a deed of trust, owes to the debtor, as he owes to all with whom he may deal, fairness and good faith. It is also a duty not to take advantage of the power he may have over the trustee, and in directing the sale, to oppress the debtor, and not to avail himself of the power to obtain the property at a sacrifice. But he does not stand in such a relation that it is the policy of the law to disable him from purchasing at the sale by the trustee, and obtaining a title which will be free from impeachment, when the transaction is open, fair, and just. That he may be the purchaser, is often a sufficient reason for preferring the deed of trust to a direct mortgage. And that he has the ability of purchasing, often prevents a sacrifice of the property. It is always his interest to see that it brings a sum sufficient to pay his debt,

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and this affords some security to the debtor against loss by the sacrifices some times attendant upon compulsory sales. *Lynn v. Jones*, 6 Humph. 533 ; *Holmes v. Richards*, 18 How. 143 ; *Lucas v. Oliver*, 34 Ala. 626. There is no greater reason for disabling the creditor from purchasing at the sale made by the trustee, than there would be for disabling a mortgagor from purchasing under his own decree of foreclosure, or a judgment creditor from purchasing at a sale under his own execution. That each may purchase cannot be doubted.—1 Perry on Trusts, § 199 ; Freeman on Executions, § 292. The case of *Wade v. Harper*, 3 Yerger, 383, to which we are referred, may, on its peculiar facts, as was said by the same court in *Lynn v. Jones*, *supra*, have been correctly decided. It cannot be extended to sales under deeds of trust, when the creditor has no other power over the sale, than on default in the payment of the debt, to direct the trustee to execute the trusts. The lands were sold for their full value—there was no want of good faith in the trustee or creditor, and we hold the sale was not voidable at the mere election of the debtor.

The decree of the Chancellor must be reversed, and a decree here rendered dismissing the bill. The appellee must pay the costs in this court and in the Court of Chancery.

## Moberly v. Peek.

### *Attachment for Rent, Plea, Former Recovery.*

1. *Evidence of contract between landlord and tenant, admissible in action against sub-tenant.*—When, in an action by the landlord to recover rent, the defendant pleads that he obtained possession from the lessee, who was authorized in writing to lease the lands and receive the rents, and the landlord replies that his lessee has broken his agreement, and that the written contract had been rescinded, the contract, as well as evidence of the breach of it, or of its rescission, is admissible.

2. *Former recovery, plea of, when defective.*—A second suit is not barred by former recovery, unless the first one was brought on the same cause of action, or on part of one and the same indivisible contract, and a plea which fails to aver, or a replication which fails to negative, this fact, is defective.

3. *Same ; must show jurisdiction.*—A plea of former recovery which fails to aver, or show in some way, that the court which tried the first suit had jurisdiction of the subject matter, is defective.

APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

Ichabod Moberly obtained an attachment against Solomon

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Peek from the clerk of the Circuit Court of Talladega county. The attachment was issued for rent of land, the affidavit stating that S. Peek had removed part of the crops grown on the rented premises without the consent of Moberly, the landlord. The defendant pleaded: 1. The general issue. 2. Set-off. 3. "Former adjudication in favor of defendant of the matter in dispute as set up by the complaint in this, that plaintiff sued defendant for rent of land for the year 1877, being the rent, or a portion of the rent sued for in this case, upon an attachment for rent issued by James Lawson, justice of the peace for said county, and the said suit, upon said attachment, was tried before the said justice, before the commencement of this suit, and was determined by said justice in favor of defendant before the commencement of this suit by a judgment in said Lawson's court for the defendant." 4. "And the defendant, for further plea to said cause of action, says that the plaintiff did, on the 5th day of October, 1877, bring an action against the defendant, &c., in the justice's court, Talladega county, Alabama, before James Lawson, then acting as justice of the peace in said county, for rent of land for the year 1877. Said action was brought by attachment for rent, by the plaintiff alleging himself as landlord, and against the defendant as tenant, and said action was tried and determined by said justice, in his court at the place of holding the same. The said parties being present at the trial, a judgment in said action was rendered in said cause, by said justice in favor of the defendant. The bringing of said action, and the judgment therein, occurred before the institution of this suit. Defendant avers that plaintiff sued in said action before said justice for the recovery of the value of a portion of said rent sued for in this action, alleging and claiming the said value to be \$25." The plaintiff demurred to the 3d and 4th pleas, because they did not aver that the suit before the justice was on the same contract sued on in this case. 2. Because it did not aver that the justice had jurisdiction to try and determine the suit mentioned in the plea. 3. Because it does not aver that the judgment mentioned in the plea is of full force, and unreversed. He also demurred to the 4th plea on the same grounds. The court overruled plaintiff's demurrer to defendant's pleas, and he took issue on the plea of set-off, the statutes of limitation of three and six years, and filed a replication to the third and fourth pleas, stating that "one-fourth of 3,300 pounds of seed cotton (alleged to be worth \$25) was all that was sued for in the action mentioned in said plea, and the said amount of cotton was all that had been gathered by defendant at the time said suit was instituted."

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tuted, and was all that was claimed to be due in said action." The defendant demurred to this replication, because it did not set out the exact character of the suit mentioned in said plea, and set up no matter avoiding the force and effect of the pleading and determination of the suit mentioned in the plea, and because said plea set up no other or different promise, or undertaking of defendant, growing out of the subject matter in controversy in the suit mentioned in the plea, than that which is mentioned in said plea, whereby the defendant would be bound in this action. The court sustained the demurrer. On the trial, plaintiff offered evidence tending to show that defendant had cultivated as his tenant, during the year 1877, about seventy-five acres of land, which was a part of plaintiff's plantation in Talladega county; that the agreed rent was one-third of the wheat, oats and corn, and one-fourth of the cotton grown, as they were gathered; that defendant had paid one-third of the wheat and oats, but had not paid the rent out of the corn and cotton, and proved the value of one-fourth the cotton and one-third of the corn grown on the land during that year. Defendant proved the execution of the following agreement between plaintiff and H. C. Rogers, viz: "The said Moberly has put the said Rogers in full control and management of his farm, in renting out and collecting the rents. The said Rogers is to support the said Moberly, pay the taxes on the land, repair fences, &c., and the balance of the rent is to pay him for his labor and trouble." Plaintiff objected to the reading of this paper to the jury, on the ground that it was irrelevant. 2. Because it was void for uncertainty. The court overruled the objection, and plaintiff excepted. The defendant, while being examined as a witness, stated that he had lived in plaintiff's house from 1871 to 1877, and on cross-examination stated, but not in response to any question, that "he moved away to keep down a fuss." Plaintiff objected to this evidence, and moved to exclude it, but the court overruled his objection, and the motion to exclude, and plaintiff excepted. The defendant offered in evidence the attachment issued by one Lawson, justice of the peace, at the instance of Ichabod Moberly, against Solomon Peek for \$25, on the ground that said Peek had removed part of the crop without paying the rent. He also offered the affidavit for attachment and the bond, and the endorsement of the levy. The plaintiff objected as each was offered, but the court overruled his objections, and the plaintiff excepted as the evidence was allowed. The justice of the peace testified that "there was a trial before a jury," and an "appeal bond was given." The plaintiff objected to each of these statements as evidence, but the

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court overruled the objection, and the plaintiff excepted. Numerous other objections were presented to the introduction of evidence, but it is not necessary to set them out here, nor is it necessary to set out the charges of the court to which exceptions were reserved by the court, as they in no way affect the matters passed on. There was a verdict for defendant, and the action of the court in overruling plaintiff's demurrer to defendant's pleas, in sustaining defendant's demurrer to plaintiff's replication, and on the admission of evidence, is assigned as error.

PARSONS & PARSONS, for appellant.

BRADFORD & BRADFORD, for appellee.

STONE, J.—This suit, brought by appellant, originated in an attachment for rent. The defense is threefold. *First*, it is claimed by defendant that Moberly, the owner of the land, let it to H. C. Rogers on an executory consideration, who was to control and rent out the lands, and was himself entitled to receive the rents; and that defendant obtained the right to occupy, use and cultivate the lands from Rogers, and not from Moberly. To this plaintiff relies on two replications; first, that Rogers had failed to observe his part of the agreement, and thereby put an end to it; second, that the parties had rescinded the contract by mutual agreement. Peek's *second* defense is set off, to which the plaintiff replies the statutes of limitation of three and six years. The *third* ground of defense is former recovery, in a suit brought by Moberly before Lawson, a justice of the peace, for a part of the identical rent herein sued for. Testimony pertinent to each of these issues was admissible. Under the first line of defense, the contract between Moberly and Rogers, which was in writing, was admissible. So, also, any evidence tending to show that Rogers had, or had not performed his part of the contract, or, that the contract had or had not been rescinded, was competent, and should have been received. The testimony on most of the disputable questions was greatly conflicting.

The plaintiff interposed demurrers to the third and fourth pleas. The third plea is defective in not averring that the two suits were founded on one and the same contract of renting. To bar a second suit, the first must have been brought on the same cause of action, or upon a part of one and the same contract, which is admissible.—*S. & N. Railroad Co. v. Henlein*, 56 Ala. 368. It is also defective in not averring, in some way, that the justice had jurisdiction of the cause tried

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before him. If the plea had averred the amount claimed in that suit, and that amount did not exceed one hundred dollars, this would have shown the justice had jurisdiction of the subject matter. It is also customary in such pleas to aver the judgment relied on in bar of a second suit, remains of full force and unreversed. The fourth plea is substantially good.

The replications to the third and fourth pleas are insufficient. They do not negative the oneness of the contract.

That the defendant moved away from plaintiff's lands "to keep down a fuss," could shed no light on any issue in this cause, and should not have been allowed to go to the jury.

This is an error of statement in the 8th subdivision of the general charge. The defendant did not set up a written contract between plaintiff and himself. The written contract set up was between plaintiff and Rogers.

We find no other errors in the record.

Reversed and remanded.

## *Ex Parte Sibert.*

### *Application for Mandamus.*

1. *Appeal does not supersede execution of decree without proper bond.*—Execution of a judgment or decree is not arrested or superseded by an appeal to the Supreme Court, unless a bond with sufficient sureties, payable and conditioned as prescribed by the statutes, is executed and filed.

2. *Supersedeas bond; condition of, when decree for payment of money.*—When the judgment or decree is for the payment of money, the bond to supersede its execution, must be for double its amount, payable to the appellee, with sufficient sureties, and conditioned "to prosecute the appeal to effect, and satisfy such judgment as the Supreme Court may render in the premises."

3. *Same; conditions of, when not for payment of money.*—But when the decree which is sought to be superseded, declares a lien on lands for a specific sum of money, and orders the register to sell the lands for its payment after default, the bond, to operate as a supersedeas, must be framed and taken (under § 3928 of the Code) in such sum and with such condition as will indemnify and secure appellee from loss or delay in the execution of the decree, if it is affirmed, and if independent security for the costs of appeal is not given, it should also cover them.

4. *Decree; execution of, compelled by order of court.*—When an insufficient supersedeas bond has been taken, and the register refuses to execute the decree, he should be compelled to do so, by an order from the Chancellor.

5. *Decree; when execution of, compelled by mandamus.*—When it is shown, *prima facie*, that from error, or omission of duty, the judge of an inferior tribunal has denied an order essential to a speedy execution of its decrees, or judgments, a rule *nisi* will be awarded, and on the return of the rule, if no good cause is shown why it was refused, a peremptory *mandamus* will be awarded.



[Ex parte Sibert.]

APPEAL from Etowah Chancery Court.

Tried before Hon. N. S. GRAHAM.

On August 3, 1880, Hon. N. S. Graham, Chancellor of the Eastern Chancery Division of the State of Alabama, rendered a decree in term time, in a cause pending in the Chancery Court of Etowah county in favor of W. J. Sibert, as administrator of the estates of O. W. Ward, and Sarah A. Ward, against C. B. Maddox, W. P. Prickett, *et al.* The bill was filed to enforce an equitable lien on land.

The decree declared the complainant, S. A. Ward, entitled to relief, ascertained the amount due her to be \$1036.62, without a reference to the register, and orders that unless said sum, and the costs of suit, be paid by the defendants within twenty days after the date of decree, the register shall sell the land. The decree authorizes the parties to the suit to become purchasers at the sale, directs the register to retain costs and commissions out of the proceeds of the sale, orders the respondents, or any person in possession, to deliver possession of the land to the purchaser at the register's sale, on exhibition of the latter's conveyance to him, and empowers the register to issue a writ of execution to any sheriff of the State of Alabama, commanding him to execute the order to deliver possession to the purchaser, and also requires the register to report his action in the premises, and the balance due complainant, or the surplus, if any, to the next term of the court. On August 29, 1881, the defendant applied to James T. Brooks, register in chancery for Etowah county, praying him to fix a supersedeas bond, superseding the decree of August 3, 1881, and staying its execution pending an appeal to the Supreme Court of Alabama, and also praying him to grant said appeal, "upon defendant's entering into such bond and sureties as your Honor may deem fit to suggest, and upon petitioner giving security for the costs of said appeal." The register granted the appeal upon defendant's entering into a bond, with good and sufficient security, for \$2073.20, conditioned that the petitioners "shall prosecute the said appeal to effect, and satisfy such decree as the Supreme Court may render in the premises; and said petitioners having executed such bond, with H. and B. as sureties, it is ordered that the same be filed and approved." On Aug. 30, 1881, complainant's solicitors requested the register to proceed to execute the decree, but he declined to do so, on the ground that "the respondents had taken an appeal to the Supreme Court," and had executed what he regarded as a proper supersedeas bond. On Sept. 14, 1881, counsel for complainant gave notice to counsel for defendant, that they would move the Chancellor to grant a mandatory order,

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or other remedial writ, against J. T. Brooks, register, &c., compelling him to proceed without delay in the execution of said decree. On September 26, 1881, the Chancellor heard this motion, which set up the foregoing facts, and while he held that the bond was insufficient to supersede the decree, declined to issue any order to the register, as prayed for by complainant, on the ground that he ought not to interfere with the register under the facts of the case. On Oct. 11, 1881, complainant applied to the Supreme Court for a *mandamus*, or mandatory order, directed to Hon. N. S. Graham, compelling him to grant an order to the register to proceed to execute the decree.

AIKEN & MARTIN, for appellant. (No brief on file.)

DENSON & DISQUE, for appellees.—The register had power to “direct the amount and condition of the appeal bond.” Code, § 3928. He decided that the bond in this case superseded the execution of the decree. No court has a right to compel him to include conditions or terms in the bond, to make it a supersedeas bond, when the statute expressly gives him the authority to determine the condition of the bond.

Any addition to the terms and conditions in a supersedeas bond, other than those required by the register under this statute, reads more like judge-made-law, than the rule of action prescribed by the supreme power in the State. The register could have required the insertion of the terms which appellants insist ought to be included in the bond, but he declined to do so, and the statute clothes him with as ample power to refuse to insert such conditions as to require them. The whole matter is regulated by the statute, and no court can override the legislative will by declaring that the register has no power to do what the law says he shall do.

BRICKELL, C. J.—Under our statutes an appeal does not of itself supersede or arrest the execution of a judgment or decree. A bond with sufficient sureties, having the condition and payable as directed by the statute, must be executed and filed, or the party obtaining the judgment or decree, is entitled to proceed in its execution. If the judgment or decree is for the payment of money, the appeal bond must be in double the amount of the judgment, payable to the appellee, with sufficient sureties and with condition, “to prosecute the appeal to effect, and to satisfy such judgment as the Supreme Court may render in the premises.”—Code 1876, § 3927. When the decree or judgment is for anything other than the payment of money, the chancellor or register, or judge, fixes

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the amount and condition of the bond.—(Code of 1876, § 3928.

The decree obtained by the relators from which the appeal is taken is not merely for the payment of money. It declares a lien on lands for a specific sum of money, and orders the register of the court, if the money, with the costs of suit, is not paid by a day appointed, to make sale of the lands for the payment thereof. In *Hughes v. Hatchett*, 55 Ala. 539, it was *held* that a bond for an appeal from such decree, to operate as a *supersedeas*, should not be framed with the simple condition to prosecute the appeal to effect and satisfy the judgment of this court. It should be taken and framed under § 3928, in such sum and with such condition as will indemnify and secure the appellee from loss and damage resulting from the delay in the execution of the decree, if it is affirmed.

And we may add, if independent security for the costs of appeal is not given, the condition ought also to cover them. The bond taken by the register, having no other condition than that expressed in § 2927, cannot therefore operate to stay and supersede the execution of the decree, and it was the duty of the register on the application of the relators to proceed in its execution.—*Stafford v. Union Bank*, 17 How. 275. The only remedy of the relators was an application to the Chancellor for an order compelling the register to proceed and obey the decree.—*Ex parte Mansony*, 1 Ala. 98, High, Ex. Leg. Rem. §§ 80, 258. On the facts shown by the petition and its exhibits, there was no reason for the refusal of this order by the Chancellor. When it is shown *prima facie* that from error, or omission of duty, the judge of an inferior tribunal has denied to a party entitled, an order of this character, essential to a speedy execution of its judgments or decrees, a rule to show cause will be awarded, and if good cause be not shown on the return of the rule, a peremptory mandamus will be granted.—*Stafford v. Union Bank*, *supra*; *U. S. v. Trigg*, 11 Pet. 173.

A rule must issue to the Chancellor of the eastern chancery division, requiring him, on the first day of the next term of this Court, to show cause why a mandamus should not issue commanding him to order the register to proceed to carry into effect the decree in favor of the relators, unless in the mean time the appellants shall execute a proper supersedeas bond.



[Chambers et al. v. Alabama Iron Co.]

## Chambers *et al.* v. The Alabama Iron Company.

*Bill in Equity for Specific Performance of Mining Contract, and to Enjoin Violations of it.*

1. *Injunction; when awarded as ancillary to a bill for specific performance.* Whenever a *prima facie* case for specific performance is shown, and the injury apprehended from breaches of the contract is of a nature not capable of adequate compensation in damages at law, an injunction may be awarded as ancillary to the bill.

2. *Same; motion to dissolve sustained for want of equity in bill, although submitted in vacation.*—A motion to dissolve an injunction should be sustained if the bill is without equity, although such motion is submitted in vacation.

3. *Same; what considered on motion to dissolve*—On motion to dissolve an injunction after answer filed, for want of equity in the bill, the facts stated, and not the manner in which they are stated, nor the form of the bill, nor the specific prayer for relief, should be considered; and all amendable defects should be treated as amended.

4. *Specific performance of contract, relating to lands, by party who did not sign it.*—An agreement for the sale of lands, or any interest therein, which must be in writing, and subscribed by the party to be charged thereby, may be specifically enforced by a party who did not sign it, since by resorting to equity for this purpose, he adopts the agreement and renders it obligatory on him.

5. *Same; when is matter of right.*—When a contract respecting lands, or any interest therein, is in writing, is certain and fair, in all its parts, founded on an adequate consideration, and capable of being specifically performed, specific performance is a matter of right, and it is as much a matter of course for a court of equity to decree it, as for a court of law to award damages for its breach, and it will be decreed, not only between the original parties, but also between parties claiming under them, unless some controlling equity intervenes which renders it improper.

6. *Injunctions to restrain violations of contracts; upon what based.*—Injunctions to restrain violations of contracts, are based upon the necessity of protecting legal rights when the breaches are of such a nature that damages at law furnish no adequate compensation, and this depends largely on the subject matter of the contract, its purposes, and objects.

7. *Mining property; injunction restraining trespassers on, courts liberal in granting.*—Courts of equity, in the exercise of jurisdiction to restrain trespasses on lands, or stay waste, are more liberal, and exercise a greater latitude in protecting mining property, than in cases of other injuries, since the injury, if continuous is not temporary, but is permanent, ruinous, and not capable of adequate compensation in damages at law.

8. *Injunctions; motions to dissolve in cases of trespass to lands, Chancellor has greater discretion than in other cases.*—On motions to dissolve injunctions on the denials contained in the answer, the rule that if the equity of the bill is met and controverted in the answer, the injunction should be dissolved, is more flexible, and the Chancellor has a wider discretion, when the bill seeks to restrain trespasses, or stay waste on mining lands, than to stay proceedings at law; and if irreparable damage might result from a dissolution, and the complainant would be entitled to relief on the final hearing, the injunction may be retained.

[Chambers et al. v. Alabama Iron Co.]

APPEAL from Talladega Chancery Court.

Heard before Hon. N. SMITH GRAHAM.

This was a bill in chancery, filed May 31st, 1880, by the Alabama Iron Company against Henry Heine and George W. Chambers. After the answers of the respondents to the bill were filed, they moved to dissolve an injunction which had been granted on the filing of the bill, and this motion was submitted in vacation for a decree. The Chancellor refused the motion, and retained the injunction, and his decree is assigned as error. The allegations of the bill, and the denials of the answers, so far as they are necessary to a proper understanding of the points decided, are stated in the opinion of the court.

BRADFORD & BISHOP, for appellants.—The answers of the respondents denied the material averments of the bill, and the injunction should have been dissolved when they came in.—1 Brick. Dig. 677, § 543. The contract set up in the bill was for the sale of an interest in land, and should have been signed by the Alabama Iron Company, the party to be charged. Without this signature it was void under the statute of frauds.—Code, § 2121; 8 Ala. 546. Then, again, there were mutual covenants in the agreement, and it was an unexecuted contract. Injunctions ought not to be granted except on unquestioned evidence of complainants' title, (High on Injunc. 421-463); nor when it is alleged that defendant is in possession under an adverse claim, (High on Injunc. 421); nor when the bill fails to aver that the injury charged goes to the destruction of the estate of inheritance, or is productive of irreparable mischief to the property, and fails to state the facts constituting the irreparable mischief.—High on Injunctions, 421. The bill shows a purchase under a parol agreement, and fails to aver a payment of all or a part of the purchase-money.—Code, § 2121. The motion to dissolve the injunction should have been granted.

BOWDON & KNOX, for appellee.—The Alabama Iron Company, although it did not sign the contract, was as much bound by it as were the respondents to the bill, if it accepted it. *Phelps v. Townsend*, 8 Pick. 392; *Wetumpka R. R. Co. v. Hill*, 7 Ala. 772; 1 Parsons on Con. 449; 11 Iowa, 161; 24 *Id.* 387. The statute of frauds has no application to the case, for the complainant, by filing the bill, has made the remedy mutual. Browne on Stat. Frauds, 366; *Shirly v. Shirly*, 7 Black (Ind.) 452; *Ballard v. Walker*, 3 John. Cases, 60; 10 Watts, 387. The bill shows that the respondents were at work continuously, digging iron ore, and this gave the complainant a right

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to an injunction. Where a mere trespasser digs into and works a mine to the injury of the owner an injunction will be granted, because it operates a permanent injury to the property as a mine.—2 Story's Equity Jur. 928, 929; *Livingston v. Livingston*, 6 John. Ch. 497; *Hanson v. Gardner*, 7 Ves. 305; *Thomas v. Jones*, 32 Ala. 725; *Wright v. Moore*, 38 Ala. 599. "That is not an unbending rule which requires an injunction to be dissolved when the answer denies the equity of the bill, for the Chancellor may retain it when the facts disclose a good reason for doing so."—*Miller v. Bates*, 35 Ala. 580. In this case the Chancellor denied the motion to dissolve, and unless this court can see clearly that he erred, it should not disturb his decree.

BRICKELL, C. J.—We do not concur in the view of counsel for the appellants that the equity of the bill is addressed to the jurisdiction of the court to stay waste, or to restrain trespasses on land, or for the prevention of irreparable mischief. It is rather a bill for the specific performance of the contract entered into by Heine with the appellee, and to restrain violations thereof for which the law furnishes no adequate remedy. The injunction is merely ancillary, and is necessary to the main design and full relief, if there is a contract the court will enforce specifically. It is warranted, whenever a *prima facie* case for specific performance is shown, and the injury apprehended from breaches of the contract, are of a nature not capable of adequate compensation in damages at law.—High. on Inj. § 695; 1 Edin on Inj. 45-49.

The defendants having answered, submitted to the Chancellor in vacation, a motion to dissolve the injunction, resting the motion upon two grounds, as we understand: *First*, That the bill is without equity; and *Second*, That there is in the answers a full, complete denial of all the facts upon which depends whatever of equity may be found in it. The first point of consideration is, therefore, whether upon the facts stated in the bill, not looking to, and irrespective of the answer and its denials, a case of equitable jurisdiction is presented? For although the motion to dissolve is submitted in vacation, it should be sustained if the bill is wanting in equity.—*Nelson v. Dunn*, 15 Ala. 501; *Cone v. Webb*, 22 Ala. 583. It is the facts stated which should be considered, not the manner of stating them, nor the form of the bill, nor the specific prayers for relief. Whatever of amendable defects may be apparent should, *pro hac vice*, be regarded as amended. *Nelson v. Dunn*, *supra*; *A. & F. R. R. Co. v. Kenney*, 39 Ala. 307.

In substance, the bill avers that Heine was seized in fee



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of a particular tract of land, upon which there was a quantity of iron ore. The appellee is a private corporation, organized under the laws of this State, having here its principal place of business, and engaged in the manufacture of iron. In the course of its business, and in the exercise of its powers, on the 1st day of October, 1879, through its president and superintendent, the appellee and Heine, made an agreement in writing, subscribed by Heine and his wife, a copy of which is exhibited, whereby he made sale to the appellee of all the merchantable iron ore on said tract of land, at ten cents per ton of two thousand two hundred and sixty-eight pounds, payable on the 15th day of each month, for all ore dug and delivered the preceding month. The agreement further stipulating that the appellee should dig and mine the ore, in such quantities as it might wish and need, and should have the use of water from a well on the land, the right to build cabins thereon for its laborers, who were employed in mining, and the right to use and occupy such cabins for that purpose, and a right of way to haul the ore to the Selma, Rome & Dalton Railroad. On the 28th November, 1879, under the agreement, the appellee having made a contract with one Snow, to mine, remove, and ship the ore to a furnace the appellee was operating, with the knowledge and consent of Heine, entered upon and took possession of the land. Snow opened a mine on the land, and removed and shipped the ore therefrom to the appellee until the 5th April, 1880, when the contract with him was rescinded, and he surrendered possession to the appellee; and one Riggs, as the agent of appellee, went into possession for the purpose of mining, removing, and shipping the ore to the furnace. On the 3d of May, 1880, Chambers, the appellant, claiming the land under some agreement with Heine, the nature of which was unknown to the appellee, placed laborers at work in the mine the appellee had caused to be opened, compelling its agent and laborers to leave and abandon the same; and with a large force of laborers, he is from day to day, digging and removing the ore, converting the same to his own use. Whatever of claim Chambers may make to the land, it is alleged, was acquired with full notice of the claim and right of the appellee. The agreement is subscribed by Heine and his wife, and attested by witnesses, but not subscribed by any officer or agent of the appellee.

The first proposition made in opposition to the bill, is, that the agreement is not complete; that it rested in treaty or negotiation, until it was completed by subscription by some officer or agent of the appellee, having authority to bind it. The subject matter of the agreement is an interest in lands,

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and it must, under the statute of frauds, be manifested in writing, to confer rights.—*Riddle v. Brown*, 20 Ala. 412. The several sections of the English statute of frauds, relating to the transfer of estates or interests in lands, are compressed into a single clause of our statute, which reads: "Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase-money, or a portion thereof be paid, and the purchaser put in possession by the seller," is void, unless the agreement, or some note or memorandum thereof, is in writing, subscribed by the party to be charged, or some other person by him thereunto lawfully authorized in writing. There are changes in the phraseology of the statute, and the introduction of new terms which require a different construction from that given the former statute of force in this State. There are also cases falling within the statute, not within that statute. And the part performance, the letting into possession, the purchase-money, or a part being paid, is an exception from the statute, not as formerly, merely ground in equity for withdrawing the case from its operation. But in respect to the signing, or subscription, the words of the present, and of the former statute, in substance, are the words of the English statute; the one employing the word *signed*, the other the word *subscribed*. The requisition of the English statute was that the writing should be *signed* by the party making or creating the estate or interest. The requisition of the present statute is, that it must be *subscribed by the party to be charged therewith*. Whatever of doubt could be entertained, whether an agreement or memorandum signed only by one party, could be enforced by the other, is dissipated by an almost unbroken current of authority.—*Seton v. Slade*, 7 Vesey, 265; (S. C. 3 Lead. Cases in Eq.); Browne on Stat. Frauds, § 366; 1 Story's Eq. § 736a (12th Ed.). All the purposes of the statute are satisfied—all just apprehension that the agreement will not be mutual in operation, is removed, when, as in the present case, the party not subscribing resorts to equity for a specific performance, thereby adopting the agreement, and rendering it obligatory upon him. Beside, when a party accepts and acts upon an agreement of this character, conferring benefits upon him, he is bound, though he may not sign or subscribe it, to the performance of the duties and obligations it imposes; and while he may claim specific performance from the party signing, the converse right exists against him, and from him specific performance may be compelled.—*Randall v. Tatham*, 36 Conn. 48. The agreement was complete—it

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did not rest in treaty or negotiation, after its acceptance by the appellee.

In all its terms, so far as is apparent upon its face, or as is shown by the allegations of the bill, the agreement is certain, fair, and just. There is nothing uncertain or indefinite in the subject matter, or in the consideration, or in the rights or obligations of the parties. Nor is there any indication that the appellee has disregarded its obligations, or is incapable of performing them. Nor is there any fact or circumstance apparent, indicative of unfairness in obtaining the contract, or of hardship in the obligations imposed on Heine. It is said the specific performance of contracts is not a matter of unqualified right in either party, but that it rests in the sound and reasonable discretion of the court, in view of the particular circumstances of the case presented.—1 Story's Eq. § 742. But when a contract respecting lands, or any interest therein, is in writing, certain and fair in all its parts, founded on an adequate consideration, capable of being performed, specific performance becomes a matter of right; and it is as much a matter of course for a court of equity to decree it, as for a court of law to award damages for its breach. 1 Story Eq. § 751. And it will be decreed not only as between the immediate parties, but as between and against parties claiming under them, unless there is some controlling, intervening equity, which would render it improper. —*Brewer v. Brewer*, 19 Ala. 481. Looking to the contract and the averments of the bill, there can be found no reason for withholding specific performance as against Heine. The sanctity of contracts, which the law and justice require should be kept inviolate, and the consummation of the purposes of parties in entering into them, demand it. With notice of the contract, of the right it conferred on the appellee, Chambers acquired whatever of claim he may have to the lands, and can have consequently no equity to protection against specific performance, not resting in Heine.

The bill is not wanting in equity, as a bill for the specific performance of the contract, and the only other question for consideration, is whether upon its allegations, violations of the contract should be restrained by injunction. In the consideration of this question, we put aside the averment of Chambers' insolvency, because it may be regarded as denied by the answers; and for the better reason, that there is no averment of the insolvency of Heine, who would be answerable at law in damages for a violation of the contract, because of all the acts and doings charged upon Chambers. Insolvency is often a material fact in determining whether remedies at law shall be exhausted, or in determining whether such



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remedies are adequate for the injury to be relieved against in equity.

It may not, however, be true that the insolvency of one of several wrong-doers lessens the adequacy of remedies at law, or, in proper cases, relieves from the necessity of resorting to them. The necessities of this case are met, if upon well established principles, a court of equity should by injunction prevent the violations of this contract which are being perpetrated, whether the parties complained of are solvent or insolvent.

Injunctions to restrain violations of contracts are based upon the necessity of protecting legal rights, when the breaches are of such a nature that damages at law furnish no adequate compensation. Whether damages will afford adequate compensation depends of necessity largely upon the subject matter of the contract, its purposes and objects. In the exercise of its jurisdiction to restrain trespasses upon lands, or to stay waste, courts of equity are more liberal, exercise a greater latitude, in interfering for the protection of mining property, and interests therein, than in cases of other injuries.—High on Inj. § 468; 2 Story Eq. § 923-9. The injury, if continuous, is not regarded as a mere fugitive, temporary trespass, capable of compensation in damages at law, but it is permanent, ruinous and irreparable, impairing the present and future enjoyment of the property, and if courts of equity refused to interfere for its prevention, there would often be an absolute failure of justice. The same principle must be applied in interfering to restrain the violations of contracts, having ores and minerals for their subject matter, especially when the contract confers a clear fixed right to take and remove them, for an indefinite period of time. There can be no estimate of the damages which would result from the repeated violations of such a contract, and the litigation springing from them would be interminable. The bill disclosing a fair and just contract of which specific performance should be decreed, its nature and subject matter, and the inadequacy of legal remedies to afford just and fair compensation for its violations, the interference by injunction was a necessity to prevent a failure of justice.

It is unnecessary to scan the answers closely. In the view we have taken of the case, whatever could be said of them, if the bill was addressed to the jurisdiction of the court for the prevention of waste, or of trespass, it cannot be said they contain clear, positive denials of the material facts upon which the right of the appellee to relief must depend ultimately. Beside, the rule that injunctions shall be dissolved, when the equity of the bill is met and controverted by the

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answer, is more flexible, yielding more to the particular circumstances, in cases of this character, than in cases of injunctions to stay proceedings at law. The Chancellor has a large discretion over the subject, and though the answers negative the equity of the bill, may retain the injunction, when, if on a final hearing the bill should be sustained, irreparable injury would be the consequence of a dissolution. *Bibb v. Shackelford*, 38 Ala. 611.

We find no error in the record, and the decree is affirmed.

## Holt v. Agnew et al.

*Bill in Equity by Married Woman, who had been Relieved of Disabilities of Coverture, to set aside Transfer of Insurance Policy made by her in Payment of Husband's Debt.*

1. *Constitutional provisions read and construed in reference to common-law.* Constitutional provisions which were intended to remedy defects in the common law, must be read and construed in the light of that law; and when words of definite signification at common law are used in such provisions, and there is no intention manifested that they shall be taken in a different sense, they are employed in their known and defined meaning.

2. *Same; what the provisions regarding separate estates were intended to accomplish.*—The common law powers of the husband over the wife's property, had been abrogated long before the enactment of the constitutional provisions, (Art. X, § 6) declaring that "all property of every female shall be and remain her separate estate, and shall not be liable to the debts of the husband," &c., which were intended to prevent their restoration, and those provisions do not refer to the voluntary payment by the wife of the husband's debts, which depends for validity on her capacity as owner of the estate, but to the liability which arose as an incident of ownership from the exercise by the husband of his common law powers over the estate.

3. *Same; create equitable separate estate in married women.*—Whenever an estate was limited to the sole and separate use of a married woman, before the enactment of the statutes, or these constitutional provisions, she was regarded in a court of equity as a *feme sole*, and could sell or charge the property just as if she were *sui juris*, and the constitutional provisions only create an equitable separate estate, over which she could exercise the same control, if the statute did not intervene and attach to it peculiar properties and incidents.

4. *Statutory separate estate; power of wife over, when husband is trustee, and when he has been removed.*—The wife cannot charge or alienate her statutory estate to pay her husband's debt, nor mortgage it to pay any debt or demand whatever. She may sell and convey it, but the husband must join in the conveyance, which must be witnessed or acknowledged. If, however, the husband who, under the law, manages her property as trustee, becomes unfit to control it, a court of equity will remove him, and the wife then becomes invested with all the power over the property which she would have as a *feme sole*.

5. *Wife; may be relieved of the disabilities of coverture as to separate estate, and may then pay husband's debts.*—The wife may, on application to the Chancellor, be relieved, under the statutes, from the disabilities of coverture, as to her separate property, and her power to buy and sell then becomes unlimited,

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and there is no reason for excluding the power to make mortgages, or transfers of any kind, to secure the debts of her husband,

6. *Injudicious transfers of property not interfered with by courts.*—The owner of property has the right to dispose of it at will, and courts will not assume to control his disposition of it, because they are injudicious, or unwise; but free and voluntary consent is essential to every contract, and this is generally imported by the contract itself.

7. *Confidential relations; rule as to transactions between persons standing in.* But where the parties stand to each other in confidential relations, the contract does not of itself import consent. The burthen of proving the transaction fair and just, and the consent of him who sustains the detriment, and is subject to the influence, is upon the party who takes the benefit, and in whom the trust was reposed.

8. *Wife; transactions with, when she suffers loss and gains no benefit; how regarded in equity.*—Transactions with a wife, looking to the relief of a diseased husband, who is harassed in mind, and in dread of criminal prosecution, from which she suffers detriment, without deriving corresponding benefit, in which she parts with property, without receiving an adequate valuable consideration, the parties dealing with her having knowledge of her distressed condition, will be investigated vigilantly by courts of equity, and if there be any trace of undue influence from any source, or advantage taken of her condition, it will undo them.

9. *Same; same.*—Fraud need not be shown, in such case, but if the wife acted hastily, without time and opportunity for deliberation, in the absence of disinterested advice, and without opportunity to obtain it, or, if she was acting under the influence of the fear of punishment of her husband, or of extreme terror, or, of apprehension of his impending death, and her motive was his relief, a court of equity must intervene and restore her to the condition in which she was, when induced into the transaction.

10. *Husband's debts; when payment of by wife will not be disturbed.*—When it is shown that there was no haste, no want of deliberation on the part of the wife, no threat of prosecuting her husband criminally, but that she had the advice of friends (although she knew her husband's creditors were acting with the advice of counsel), and that her avowed purpose in transferring a policy of insurance on the life of her husband in payment of his debts, was to save the good name of her husband and children, the law cannot condemn the fair and intelligent exercise of such a motive, and the transfer will not be disturbed.

### APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in equity, filed by Annie D. Holt, wife of Geo. W. Holt, against G. W. Agnew, Duncan T. Parker, and W. A. Smith. All the facts of the case, so far as they are necessary to a correct report of it, are stated in the opinion of the court. On the hearing the Chancellor dismissed the bill, and his decree is assigned as error.

GREGORY L. SMITH, for appellant.—The life insurance policy in favor of appellant was her statutory separate estate, and, under the provisions of the Constitution, was not liable for any debts, obligations, or engagements of her husband. A married woman cannot, under the Constitution, mortgage or convey her statutory separate estate, in payment of her husband's debt. If any statute undertakes to permit her to do this it would be unconstitutional, for whatever shape the



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transaction is made to assume, if its purpose and effect is an appropriation of her statutory estate in payment of such debt, the transaction is void as to all persons not occupying the relation of *bona fide* purchaser for value and without notice.—*Weil Bros. v. Pope*, 53 Ala. 385; *Williams, Berney & Co. v. Bass*, 57 Ala. 487. A wife cannot pay her husband's debts by being first declared a "free dealer," and then appropriating her statutory separate estate to that purpose. The whole object of the constitutional provision would be destroyed by an act of the Legislature, which would permit it. A woman, however, is only declared a *feme sole* as to particular acts, and she is still under disability as to everything except as to the things mentioned. The payment of her husband's debts with her statutory estate is not mentioned, and she cannot, under the Constitution, be enabled to do so. The act of appellant, in transferring the insurance policy, was not free or voluntary. What was the motive? Payment of her husband's debt, and the Constitution does not permit it. Appellant's motive was to prevent her dying husband from indictment, and the defendants knowing her motive took advantage of it. Here are dealings between a woman, and a husband dying from mental anxiety, coming to represent her rights, from weary, sleepless nights of watching over him who is dearest on earth to her; distracted by his delirious visions of criminal prosecutions, with no friend to advise her, and three shrewd business men, aided by counsel. The transfer ought not to be permitted to stand, under the law and the facts. See 1 Story Eq. Jur. 133, 238, 339; *Whelan v. Whelan*, 3 Conn. 557; *Balkum v. Brear*, 48 Ala. 78; *Kennedy v. Marcus*, 45 Ala.; *McCabe v. Hussey*, 2 D. & Clark, 440; 26 N. Y. 9.

JOHN LITTLE SMITH, for appellees.—The provisions of the Constitution of Alabama were not intended to fix the statutory estates of married women in mortmain. The language of Art. X, § 6, relates to all property which a married woman may acquire before or after marriage, as well by contract or purchase, as by inheritance, and it must therefore be applied to all alike. If it means that property, which a married woman took under a contract which expressly made it chargeable, at her will, for the debts of her husband, should not be so charged, it would violate the provisions of the contract, and the Constitution of the United States. The language of the Constitution means the same thing that such language means, when we find it in deed settling property on married women, with a provision that such property shall not be liable for the debts, contracts, and engagements of the husband. It is well settled that she may charge the property

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with her husband's debts, unless the deed contains some further limitations on her powers. The legislature can authorize her to charge such property as a married woman who holds her property with no other restrictive words than those mentioned.—*Robinson v. O'Neal*, 56 Ala. 541; *Short v. Battle*, 52 Ala. 456; *Halliday v. Jones*, 57 Ala. 527; 1 Bishop Mar. & Div. 797-8. The act of Feb. 10, 1875, was intended to authorize the Chancellor to make married women such free dealers as the legislature could have made them, is found in the fact that since the passage of the act, no bill can be introduced to make a married woman a free dealer, unless it be accompanied with a transcript of the record, from the proper Chancery Court, showing an application to the Chancellor for that purpose, his refusal and the reasons therefor. The act, therefore, covers all cases, and there is no limitation restraining their power to mortgage their property, to pay the debts of the husband. The statutory separate estate is given by statute and may be modified by statute.—57 Ala. 527. The proof shows, overwhelmingly, that the defendants were not guilty of any fraudulent practices. There was no relation of trust or confidence between the parties in this case, such as exist in cases cited by the appellant. The mere fact that the acts of complainant enured indirectly to the benefit of the defendants can not, and ought not to, force them to refund money which they did not receive.

BRICKELL, C. J.—It is certainly true that the motive of appellant in becoming a “free dealer,” as it is termed, or rather in obtaining relief from the disabilities of coverture as to her statutory or other separate estate, through the decree of the Chancellor in pursuance of the statute (Code of 1876, § 2731), was the assignment of the policy of insurance taken in her name, on the life of her husband, to pay the debts of her husband. It is also true, the appellees aided her in obtaining the decree, with full knowledge of her motive, and to avail themselves of the assignment in discharging the obligation of the husband for which they were answerable as his sureties. The argument pressed by the counsel for the appellant is, that though she was by the decree of the Chancellor relieved from the disabilities of coverture, as to her statutory or other separate estate, and endowed with full capacity to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a feme sole, yet, she was without capacity to make any disposition of her estate in payment of the debts of her husband. The incapacity is supposed to result from the constitutional provision: “The real and personal property of any female in this State,

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acquired before marriage, and all property, real and personal, to which she may afterwards be entitled by gift, grant, inheritance or devise, shall be and remain the separate estate and property of such female, and shall not be liable for any debts, obligations, and engagements of her husband, and may be devised or bequeathed by her, the same as if she were a *feme sole*."—Const. 1868, Art. 14, § 6; Const. 1875, Art. 10, § 6. Assuming the truth of the proposition, it is insisted the defendants, to whom the policy of insurance was assigned for the purpose of paying the debts of the husband, and who used it for that purpose, are liable as constructive trustees to respond to the appellant for the moneys realized from the assignment. The argument is not, however, sound—the foundation upon which it rests, that the constitution prohibits the wife from applying the estate it secures to her, to the debts, obligations, or engagements of her husband, can not be admitted. If the terms and words of the constitution, had at, and prior to, its adoption, been employed in a gift or conveyance to, or a settlement upon, a married woman, they would have created an equitable separate estate. The execution of liability of the estate for the debts of the husband would have been simply an expression of the implication of the law of an incident of the estate, and the negation of one of the conveyances resulting from coverture at common law, attaching to the estate held or acquired by the wife, to which the marital rights of the husband, as defined by the common law, attached. The constitution must be construed just as a conveyance or a gift in its terms would have been construed, at the time of its adoption. Constitutional provisions of this character, framed with the view and intended to remedy defects or evils in the common law, as it had existed in the State, must be construed and read in the light of that law. When words and terms are employed in such provisions, having by the common law a definite signification, and there is not an intention manifested to attach to them some other signification, it is more than presumption that they are used in their known and defined meaning and sense.—Cooley's Cons. Sim. 74; *Taylor v. Woods*, 52 Ala. 477; *Bender v. Meyer*, 55 Ala. 596.

By the common law, husband and wife were regarded as but one person, for many purposes. The legal existence of the wife was lost, or, as most often expressed, merged in that of the husband. She was without capacity to contract, and had not the administration of her property. By the marriage, if she was seized of an estate of inheritance, the husband became seized thereof, taking the rents and profits during their joint lives, and, by possibility, during his life.



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If she had an estate of freehold, not of inheritance, as for her own life, or the life of another person, the husband became seized of such estate, and entitled to the rents and profits during marriage. If the estate was *per autre vie*, the husband became a special occupant of the land during the life of such person. Her chattels real passed to the husband, who had power to sell, assign, or make other disposition of them, at pleasure. As to her choses in action, he had an unqualified right of reducing them to possession, and, thereby, acquiring absolute ownership of them. He could sue for, release, discharge, or assign them. If, without reducing them to possession, or altering their character, he died, his rights, springing out of, and dependent on, the marital relation, terminated with its dissolution. Of her personal property in possession, *eo instanti*, the marriage, title and possession passed to the husband. And personal property, title to, and possession of, which accrued to, or was acquired by, the wife, during the coverture, became the absolute property of the husband. Her possession was his possession, because, in the eye of the common law, she was positively incapable of a possession distinct from that of the husband. These were the property rights of the husband, as defined and declared by the common law, and when they were exercised, as a necessary incident of ownership, a liability of the property for the payment of his debts resulted. For twenty years before the present provision was introduced into the constitution, the statutes had enlarged the capacity of married women to take and hold property, and had abrogated the common law rights of the husband to the estate, real or personal, of the wife. The purpose of the constitution was the prevention by legislative enactment of a restoration of the common law, and the preservation of the enlarged capacity of the wife. Coverture does not now render her incapable of taking and holding. The capacity remains to her, in the words of the constitution, as if she were a *feme sole*. Title and ownership remaining to, and residing in her, the husband by marriage acquiring neither, nor a right to either, liability for the payment of his debts, an incident of ownership, would have been excluded, without the explicit declaration, found in the constitution, that it should not attach. It is the common law liability of the property of the wife, for the payment of the debts of the husband—a liability his creditors could enforce against the consent of the wife—to which the constitution refers.—*Bender v. Meyer*, 55 Ala. 576. It has no reference to the voluntary payment of the debts of the husband, as it has not to any other disposition the wife may make of the estate secured to her, freed from the com-

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mon law rights of the husband, and freed from subjection to such rights by legislative enactment. All such dispositions depend for their validity upon the capacity of the wife, as the owner of the estate. There was no purpose to render it illegal for the wife to pay, or secure, the debts of the husband, if the powers conferred were large enough to embrace such a disposition of her estate. And it is quite an error to suppose that a policy is established which would be offended if the wife, from affection, or on any fair consideration, should relieve her husband from the pressure of debt.

Prior to the statutes, or to the constitutional provision, whenever an estate was by the terms of its creation limited to the sole and separate use of a married woman, whether a trustee to take and hold the legal title was interposed or not, the property rights of the husband at common law were excluded, an equitable estate was created. As to such estate, a court of equity regarded the wife as a *feme sole*, and she could in reference to it contract, alienate, or otherwise dispose of, or charge it, as if she were fully *sui juris*.—*Short v. Battle*, 52 Ala. 460; *Demarrest v. Wynkoop*, 3 Johns. Ch. 129. As we have said, by appropriate terms, the constitution creates an equitable separate estate, and if the statutes did not intervene, and narrow and circumscribe the capacity of the wife to contract, and to alienate or charge it, and attach to it peculiar incidents and properties, over it she could exercise the same power which she could have exercised over an equitable separate estate.—*Hooper v. Smith*, 23 Ala. 639. The statutes intervene, and disable her from charging, or alienating it, in the payment of the husband's debts, or from mortgaging or assigning, or selling it, to secure, or to pay any debt, or demand, whatever. They limit her power to a sale and conveyance, in which the husband must join, and which must be in writing, attested by witnesses, or, acknowledged before an officer having authority to take and certify the acknowledgment of conveyances. The statutes also commit the estate to the care of the husband, as trustee, and authorize him to take the rents and profits without liability to account for them. These limitations upon the capacity of the wife, embarrassing the alienation of the estate, are found sometimes operating to lessen its value to her, and to render it of but little advantage in the maintenance of herself and family. From many causes the husband, without fault on his part, may become unsuitable as trustee to manage it, or it may not be safe that the rents and profits should pass into his possession. Whenever he becomes incapable of, and unfit for the discreet management and control of the estate, the statutes confer on the wife the right to obtain a decree

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from the court of chancery for his removal from the trusteeship, and when such a decree is obtained, another trustee is not interposed, but the wife has the same power and control over the estate, that she would have, if she were a *feme sole*. (Code of 1876, §§ 2717-18). She may then mortgage or charge it as security for her own debt, or for the debt of the husband.—*Bell v. Locke*, 57 Ala. 242.

The statutes go further, and authorize the Chancellor, on application of the wife, to relieve her from the disabilities of coverture as to her statutory, or other separate estate, and empowering her to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*. The words of the statute are plain and unambiguous, and the power of disposition conferred on the wife is very broad when she is relieved of the disabilities of coverture; there is no exclusion of her power to mortgage, or to assign, her estate to secure the payment of the debts of the husband. The power to mortgage, to sell, or otherwise transfer, is general and unlimited, and there can be no reason for engrafting an exception of mortgages, or transfers of any kind, to secure the debts of the husband. The exception would be repugnant to, and inconsistent with the terms of the statute. Passing upon a private statute, enabling a married woman to receive and hold property by gift, purchase, or inheritance, as a *feme sole*, this court, in *Perryman v. Greer*, 39 Ala. 133, declared there was no doubt of her capacity to mortgage such estate as security for the debt of the husband. The appellant had full capacity, after being relieved of the disabilities of coverture by the decree of the Chancellor, to assign, or to sell, the policy of insurance, in the payment of her husband's debts. It must, however, be observed that the statute does not confer on the wife, a general or unlimited power of contracting. It is only her capacity to buy, sell, hold, convey, and mortgage, which is enlarged.

It is insisted that although the appellant may have been *sui juris*, of full capacity to assign and sell the policy of insurance, yet it is shown that advantage was taken of the distressing circumstances by which she was surrounded to press her into the transaction, when she was without the aid of the advice of counsel, or of disinterested friends, and without opportunity to procure it, the appellees having the benefit of the advice of counsel, which they were pursuing. The capacity, the right to dispose of property at will and pleasure, is an incident of its ownership, which the law recognizes, and neither courts of law, nor of equity, can assume to control it, or to annul dispositions, because they may be esteemed injudicious, unwise, or improvident, or because they may not be



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such as a prudent man would make, or a just, generous, and honorable man would consent to receive. Consent, free and voluntary, is, however, an essential element of every contract and of every disposition of property. The contract, or the disposition, whatever may be its form, or character, generally, of itself, imports consent, and is sufficient evidence of it. There are relations in life, in which influence is acquired by the one party, and confidence reposed by the other—relations of which we usually speak as *confidential*, that open the way and afford opportunity for impositions, or undue influence, and yet, rather close the door to, and render difficult, the detection of its exercise. Such are the known relations of trustee, and *cestui que trust*, guardian and ward, attorney and client, principal and agent, husband and wife, but the number or character of the relations are not defined by law; “all the variety of relations in which dominion may be exercised by one person over another,” fall within the general term *confidential relations*. When, in such relation, the party subject to imposition, to undue influence, enters into a contract with, or makes a disposition of property to the other, from which detriment is sustained by the one, and benefit derived by the other, upon principles of public policy, there is no presumption of consent; the act or contract does not of itself import it. The law casts the burthen of proving the transaction fair and just, and the free consent of him who sustains the detriment, and is subject to the influence, upon the party who takes the benefit, and in whom trust was reposed.—*Johnson v. Johnson*, 5 Ala. 90; *Juzan v. Tulmin*, 9 Ala. 684; *Lowery v. Ferguson*, 54 Ala. 510; *Malone v. Kelly*, *ib.* 532; *Dickinson v. Bradford*, 59 Ala. 581; *Lanier v. Waddell*, 62 Ala. 347. In all these cases, it is a very material and important circumstance, which may relieve the transaction of much of the suspicion attaching to it, and tend to show the spontaneity of the *cestui que trust*, if he had full opportunity to obtain, and in fact did obtain competent and independent advice in reference to the transaction from counsel, or from disinterested friends, who were bound to him, and not subject to the influence of the trustee.—Kerr on Fraud, 151; *Malone v. Kelly*, 54 Ala. 546. On the other hand, if the *cestui que trust* has not such advice, and the trustee has it, and is acting upon it, the fact is as material and important, and it may be safely said, the transaction can but seldom stand vigorous judicial investigation.—*Kempson v. Ashbee*, R. 10 Ch. App. 19; *Baker v. Bradley*, 7 DeG. Mc. & G. 621; *Clarkson v. Hanaway*, 2 P. Wm. 205; *Coffman v. Lookout Bank*, (Sup. Ct. Tennessee); *Southern Law Journal*, April, 1881, 275.

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In this case, it cannot be said there was any relation of trust and confidence existing between the parties. To the fidelity and integrity of the appellees, the appellant did not commit her interest, nor did she look to them for advice or protection. They met, and by her own act and upon her own suggestion, they were invited into the relation of parties contracting with her, that she might obtain relief for her husband, afflicted by disease, harassed in mind because of the official default; from which he apprehended the most serious and extremest consequences. Transactions with her looking to the relief of her husband, from which she sustains detriment, and does not derive corresponding benefit, in which she parts with property, or rights of property, and does not obtain an adequate, valuable consideration, in view of her distressed condition, which was known to the appellees, the plainest considerations, and highest obligations of right and justice, compel a court of equity to investigate jealously and vigilantly, and to undo them, if there be any traces of undue influence from any source, or of advantage taken of her condition. Fraud or imposition may not be shown—of either the parties may be fully acquitted, yet, if she has acted hastily, without time and opportunity for deliberation, in the absence of disinterested advice, and without opportunity to obtain it, or if she was acting under the influence of threats of the punishment of her husband, or of extreme terror, or of apprehension of his impending death, and her motive was his relief, a court of equity must intervene, and restore her to the condition in which she was, when induced into the transaction. The doctrine upon which the courts act, when a party, by the force of circumstances, is reduced to a condition in which he cannot deal upon terms of equality with another, and is peculiarly subject to oppression, or imposition, or to undue influence, is thus expressed by Judge Story: "As, where he does an act, or makes a contract, when he is under duress, or the influence of extreme terror, or of threats, or of apprehension short of duress. For, in cases of this sort, he has no free will, but stands *in vinculis*, and the constant rule in equity is, that, where a party is not a free agent, and is not equal to protecting himself, the court will protect him." \* \* \* "On this account courts of equity watch with extreme jealousy, all contracts made by a party while under imprisonment, and, if there is the slightest ground to suspect oppression in such cases, they will set the contracts aside. Circumstances, also, of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so overcome his free agency as to justify the court in setting

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aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attendant upon it."—1 Story Eq. § 239. And so in cases of surprise, of sudden action without due deliberation, if there is great inequality of consideration in the transaction, and advantage is taken of the circumstances which mislead, confuse or disturb the reason and judgment, the court will intervene.—1 Story Eq. § 251. In all this class of cases it must be borne in mind that the distressed or necessitous condition of the party does not deprive him of the capacity to contract or of the capacity to dispose of his property in mere benevolence and generosity. Incapability would add to, and aggravate, rather than mitigate his misfortunes. Nor is the fact that in the light of subsequent events he may decree his transactions improvident, or that he does not obtain from them the anticipated benefits, or he suffers disappointment from any cause not traceable to the party with whom he deals, a ground or reason for setting them aside. All that can be said is, the circumstances excite the jealousy and vigilance of a court of equity, and when to them is added improvidence in the transaction, the court will interfere if there be traces of fraud, of undue advantage, or of surprise.—*Nall v. Boyer*, 30 Penn. St. 99; *Green v. Thompson*, 2 Fred. Eq. 365.

The facts of this case, as we collect them from the evidence are, that the husband of appellant had been, and was the secretary of an insurance company, having the custody of its funds, and the appellees were sureties on his official bond, answerable for his defaults. In August, 1875, his health failed, and continued to decline until his death in January, 1876.

In October, he ceased to attend to his duties as secretary, and was thereafter confined to his room. From the first of his illness, he manifested frequent terror and alarm, starting from fright in his sleep, which was nearly always restless and disturbed. His whole conduct at home, with his family, indicated that he was laboring under the constant apprehension of some impending evil, or misfortune, and of course the appellant was deeply distressed because of his condition. Soon after he was confined to his room, he confessed to the appellant that he was a defaulter to the insurance company in a large sum, probably seven or eight thousand dollars, and expressed fears that the company would prosecute him criminally. This added to her grief, and after consultation, they sent for his relative, William B. Holt, to whom he communicated the fact of his default, and from whom he requested assistance to satisfy it. The appellant was present at the interview, and voluntarily expressed her willingness to give



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up everything she possessed to make good her husband's default. At a second interview, William B. Holt informed the husband that he could not aid him in paying the default, and advised him to send for his sureties, and disclose the facts to them, as they were then uninformed of them. Smith, one of the sureties, was sent for and was informed of the default. No harshness, no threats, were indulged in by Smith, and so far as is shown, not an unkind expression. Without the presence of her husband, voluntarily, the appellant begged Smith to assist in relieving him, expressing a willingness to give up everything they possessed, for his relief. The appellee, Parker, was by Smith informed of the default, and visited the husband at his instance. To him, as to Smith, the fact of the default and its probable amount was communicated. The interview was in the presence of the appellant, and though Parker had not spoken of, or demanded indemnity or security, the appellant again voluntarily expressed a willingness to give up everything for the relief of the husband. In answer to an enquiry from the husband, if he was liable to a criminal prosecution, Parker answered, that he believed the insurance company would be satisfied if the money was paid.

The next day Parker, at the request of the husband, again visited him, and during the interview, which was in the presence of the appellant, the proposition was made by the husband to turn over to his sureties sundry notes, a policy of insurance in his own name, on his life, issued by the Mobile Life Insurance Company; and the policy of insurance, (now the matter of controversy), issued to the appellant on his life, for four thousand dollars, by the Alabama Gold Life Insurance Company. The husband explained to the appellant that this policy was payable to and could be assigned by her only, and she expressed her willingness to make the assignment, without being solicited or persuaded by Parker, and in the absence of any expression of an apprehension of the criminal prosecution of her husband, by him, or by her, or any allusion to such a prosecution. The policies were delivered to Parker, and he procured his attorneys to endorse on them the proper assignments, which were executed a few days thereafter, in the presence of Parker and William B. Holt, and after full explanation to the appellant that she had the property in and the sole power of disposing of the policy payable to her. Afterwards, Parker was informed by his attorneys, that it was doubtful whether the assignment made of the policy by appellant and her husband, would pass title to it, and suggested that if she was willing to be made a *free dealer*, she could then, in her own name, make a valid assign-

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ment. The appellant, upon being informed of these facts, consented to make application to be relieved of the disabilities of coverture, and at her request, William B. Holt became, and acted as, her next friend in the proceedings for that purpose. He read to her the petition, explained fully its nature, and that the motive was to enable her to make a better and more effectual assignment of the policy of insurance. After being relieved of the disabilities of coverture, she executed a new assignment of the policy in the presence of a notary public, after it was read to her. This assignment was executed in the presence of Parker and the husband. A sale of the policy to the Gold Life Insurance Company was then negotiated, but they declined concluding it with any one but the appellant. She visited the office of the company, attended by the appellee, Agnew, to consummate the sale, and in his absence, had an interview with the president and attorney of the company. The attorney was very prudent and careful, in inquiring if she was making the sale from fear, compulsion, or undue influence, from any source; or from the fear that a criminal prosecution would be commenced against her husband, if his default was not satisfied; all of which she disavowed. She avowed that she was acting freely to save the good name of her husband and their children. When reminded that if her husband recovered, his health would probably be so impaired that he could not obtain another insurance on his life, declaring Parker and Agnew had been her husband's best friends, and very kind to him, she said the policy really belonged to them, for it would have lapsed if they had not paid the last premium. The sale was made, the money paid to her, and she was advised not to part with it, but to keep it for the support of herself and children. Six weeks or more elapsed after the first suggestion of an assignment of the policy of insurance before the sale and payment of the money to the appellees, by whom it was applied in payment of the husband's default.

With some minuteness we have detailed the facts as we collect them from the evidence, because all cases of this kind depend essentially upon their own peculiar circumstances. As is to be expected, there is some conflict in the evidence; but the facts stated, we regard as fully proved, and reject as disproved, other facts of which there may be some evidence.

It is obvious there was no haste, no want of deliberation upon the part of the appellant in this transaction, nor was there the want of opportunity to consult counsel if she had desired. Nor was there the absence of the advice of disinterested friends. The relation of her husband, William B. Holt, to whom they gave the first information of the hus-

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band's default, and in whom they reposed confidence, was cognizant of all the circumstances, and acting as her next friend in the prosecution of her application to be made a *free dealer*, was in some degree, a participant in the transaction.

He was not under the influence of the appellees, was without any motive to promote specially their interests, and had every motive to guard and protect the rights and interests of the appellant. To her, he was bound by the ties of relationship, and by the confidence and trust in him, which she and her husband clearly manifested. While it is not expressly shown that in words he advised the transaction, it is apparent that it had full sanction and approval, and his conduct was the equivalent of the most unqualified advice in words. Nor was there any misconception, or mistake of facts, or of her rights by the appellant. At all times, it was fully explained to her, that the policy belonged to her, and she alone had capacity to dispose of it. Nor was there importunity or persuasion on the part of the appellees. Upon her own suggestion, springing from her love of her husband, she from the first information of his distressed pecuniary condition, avowed her willingness to yield everything for his relief. Nor was she uninformed that the appellees had, and were acting with the advice of counsel, and that all the proceedings which were taken were intended to enable her to make a valid effectual assignment of the policy of insurance.

There was no imprisonment, no threat of it, nor of the criminal prosecution of the husband. The apprehension of prosecution, or of imprisonment, was one of the terrors vexing and harassing him, but it seems to have possessed him only, and when in the presence of the attorney and president of the insurance company, the appellant had every motive to speak freely and candidly, she disavowed being influenced by any such apprehension, or by any fear or compulsion. Then she avowed what we cannot, in view of all the evidence doubt, was her real controlling motive, the desire and purpose to relieve her husband, and as far as possible the preservation untarnished, of his good name, alone influenced her. Such a motive will influence the wife, and we cannot say the law disapproves or condemns its fair, intelligent, spontaneous gratification. All the courts can do, is to be vigilant and jealous in guarding and protecting her from all abuse of the confidence her relation compels, and from all practices upon her affections by the more calculating, or the more wary, or more artful. When her confidence is not abused; when no advantage is taken of her condition when she acts intelligently and spontaneously, free from all circumvention, having full capacity, her executed contracts cannot be undone by



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any court.—*DeRange v. Elliott*, (8 C. E. Green) 23 N. J. Eq. 486.

We have examined the evidence in this cause again and again, and after most patient consideration, and with an anxious solicitude to guard and protect the appellant, we cannot find proofs which would justify us in undoing the transaction, and compelling the appellees to restore her the money with which she voluntarily, and intelligently parted. These observations dispose of the case, and the decree of the Chancellor is affirmed.

## Houston et al. v. Hilton et al.

*Action to Recover Value of Lease-hold Interest in Land; Plea, Statute of Frauds.*

1. *Duplicity in a complaint not ground of demurrer.*—Duplicity in a complaint could only be reached, at common law, by special demurrers, and since the abolition of such demurrers, is not a ground of demurrer.

2. *Vendee of land under parol contract; when cannot resist action for purchase-money.*—When the vendee of lands, or of an interest therein under a parol contract, takes possession under it, and his vendor is able and willing to protect him in the quiet enjoyment, he cannot successfully resist an action for the purchase-money.

3. *Error is not presumed, but must be shown.*—When the bill of exceptions does not set out all the evidence, this court will presume that the proof justified the rulings of the court below, unless the presumption is repelled by the record.

APPEAL from Cleburne Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This action was brought Aug. 14, 1878, by J. C., T. P., A. B., W. W. and E. E. Hilton, against M. L. Pinson and J. W. Houston. The complaint contained a count on an account stated, and a second count in these words, "Plaintiffs claim of the defendants the further sum of four hundred dollars due on account stated, or verbal and written agreement, for a leasehold estate, for (describing the land), which promise was made by the defendants on or about February 15th, 1876, and due June 10th, 1878." The defendants demurred to this complaint because—1. It was bad for duplicity, seeking a recovery on a verbal and written agreement, and on account stated. 2. Because it stated three causes of action, and was vague and uncertain. The court overruled the demurrer and defendants excepted. The defendants then pleaded "in short by consent"—1. Non-assumpsit. 2. The statute of

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frauds. On the trial the plaintiffs read in evidence a lease from Walter Bell to them, conveying certain lands for a term of eleven years, commencing January 1st, 1874, and offered to read a transfer of this lease to the defendants, which was as follows: "For value received we do hereby transfer all our rights, claims and lease unto J. W. Houston and M. L. Pinson, to the above lease on (describing the land)." The defendants objected to this transfer as evidence, because it did not express the consideration, and was void under the statute of frauds. The court overruled the objection, and defendants excepted. The consideration of this transfer was the sum of eight hundred dollars, one-half of which was paid in cash, and the remainder the defendants promised verbally to pay whenever Walter Bell should obtain a title to a part of the lands demised by him, by the termination of a cause then pending in the Circuit Court of Cleburne county, wherein Mrs. Elvira Chilton was plaintiff, and said Bell was defendant. Mrs. Chilton recovered a judgment in the suit, but failed to pay the value of the improvements on the land within the time allowed by law. The defendant paid to the clerk of the court within three months thereafter the assessed value of the land. The defendant introduced evidence to show that the defendants did not agree to pay the four hundred dollars, if the said Bell acquired title to the land by the payment of its assessed value. The court, at the request of the plaintiff, charged the jury, that if they believed from the evidence that "the parties intended the payment of the four hundred dollars to depend on the successful termination of the litigation in favor of Bell, that when Bell paid the assessed value of the land, then he was successful, and the four hundred dollars became due, if the jury believed that the payment depended alone on the successful termination of the suit." The defendants excepted to the giving of this charge. The court, of its own motion, charged the jury, "that the jury might find for the plaintiffs if they believed from the evidence that the parties to the contract sued on, intended that the sum of money should become payable whenever Bell should obtain a title to the lands in controversy in the suit between him and Elvira Chilton, by the termination of said suit." The defendants excepted to this charge. The defendants then asked the court in writing to charge the jury—1. "That the plaintiffs cannot recover unless they believe from the evidence that the defendants admitted to the plaintiffs, or some one of them, that they were indebted to the plaintiffs in a certain sum of money unconditionally." 2. "The plaintiffs are not entitled to recover in this action unless the evidence shows an unqualified admis-

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sion by the defendants that they were indebted to the plaintiffs in a certain sum of money." These charges the court refused to give, and the defendants excepted to each refusal. The errors assigned are, overruling the demurrer to the complaint, admitting the transfer of the lease in evidence, and giving and in refusing the charges as shown above.

SMITH & SMITH, for appellants.—The demurrer to the second count of the complaint should have been sustained. It contains matter for three separate counts, which were improperly put in one. The transfer of the lease did not describe the lands, nor did it express the consideration, and as the contract was executory the statute of frauds avoided it. *Parker, Adm'r, v. Hills*, 50 Ala. The charges given by the court were erroneous. The grantor in the lease was to obtain a title to the lands in the suit between himself and Mrs. Chilton. This title he did not acquire; on the contrary, Mrs. Chilton recovered a judgment against him. *She* acquired the title, and is only debarred from obtaining a writ of possession by Bell's payment of the money into court. The charges, which were refused, should have been given, for there must be some proof to show that after the conditional promise to pay the four hundred dollars, the defendants acknowledged that the condition had occurred which made them liable before plaintiffs could recover, as on an account stated.

STONE, J.—Duplicity in a complaint, or in a plea, unless it be a plea in abatement, is not a ground of demurrer in this State. It could only be reached by special demurrer at common law; and as special demurrers are abolished by statute in this State, save, perhaps, as to dilatory pleadings, such irregularity in a complaint is harmless.—2 Brick. Dig. 333, §§ 55, 56, *et seq.*; Code of 1876, § 3005.

The testimony in this case tended to show that the Hiltons held a lease from Bell, commencing January 1st, 1874, to continue eleven years, on two half sections of land—E.  $\frac{1}{2}$  sec. 33, and W.  $\frac{1}{2}$  sec. 34. A suit was pending in favor of Chilton against Bell, for the half section in thirty-four. The Hiltons sold this lease-hold interest to Houston & Pinson, receiving in part payment four hundred and fifty dollars; and the testimony tends to show that the transfer of the lease by Hiltons to Houston & Pinson was made in consideration of \$450 paid in cash, and of the further sum of four hundred dollars the defendants promised to pay, whenever said Bell should obtain a title to the W.  $\frac{1}{2}$  of said section 34, by the termination of the said suit of Chilton against Bell. The bill of exceptions states it does not set out all the evidence,



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and it is our duty to draw every reasonable inference, and to presume the proof of facts necessary to sustain the rulings of the court, unless the bill of exceptions repels such inference.—1 Brick Dig. 336, § 12. We feel it our duty to presume, and suppose it is a fact, that Houston & Pinson took possession of the premises, when they purchased the lease from the Hiltons. In construing the charges, we will suppose they received such possession, and had not been disturbed in its enjoyment.

A sale of lands, or of an interest in lands, even by oral contract, does not fall of its own weight.—*Gillespie v. Battle*, 15 Ala. 276. A vendee of land under a parol contract, who has given his note for the purchase-money, and been let into possession, cannot avoid its payment on the ground that the contract is void by the statute of frauds.—*Rhodes v. Storr*, 7 Ala. 346. If the purchaser takes and retains possession of the land, he cannot recover money paid under a verbal purchase.—*Cope v. Williams*, 4 Ala. 362; *Donaldson v. Waters*, 30 Ala. 175. Possession by the vendee, with the consent of the vendor, under a parol contract for the sale of land, under the old statute, took the case out of the statute of frauds.—*Danforth v. Laney*, 28 Ala. 274. Our statute of frauds—section 2121, Code, 1876—requires, “that in contracts for the sale of lands, or of any interest therein, except leases for a term not longer than one year, the agreement, or some note or memorandum thereof, must be in writing, expressing the consideration, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing; unless the purchase-money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.” But even conceding that the Hiltons did not contract in writing, yet, if Houston & Pinson took possession under the agreement, and the Hiltons are able and willing to protect them in the quiet enjoyment of the term, payment of the purchase-money cannot be successfully resisted.—*Alderson v. Harris*, 12 Ala. 580; *Lumpkin v. Reese*, 7 Ala. 173.

The pith and substance of the agreement made between the Hiltons and Houston & Pinson, was, that the latter should not be molested in the enjoyment of the leasehold estate during the continuance of the lease. That result obtained, it was a matter of no moment to them whether Bell recovered the land by the verdict of the jury in his favor, and judgment thereon, or, by paying to the clerk of the court for the use of the plaintiff, the value of the lands and tenements as assessed by the jury, on the default of the plaintiff to pay the excess of value of the permanent improvements

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over the value of the rents.—Code of 1876, § 2954; *Helvenstein v. Higgeson*, 35 Ala. 259; *Teague v. Wade*, 59 Ala. 369.

In the two affirmative charges given to the jury, the Circuit Court conformed to the rules above declared, and did not err. The two charges asked, hinge the plaintiffs' right to recover any thing in this action on the question, whether defendants unconditionally admitted an indebtedness to plaintiffs. The record, in effect, informs us it does not contain all the evidence. Indeed, there is testimony tending to show plaintiffs' right to recover, independent of any admission defendants may have made. But if this were not so, it would be our duty, in favor of the correct ruling of the Circuit Court, to presume there was evidence of the liability of the defendants, other than that which rested on their admissions. Error cannot be presumed, but must be shown.—1 Brick. Dig. 340, §§ 71, 74; *Williams v. Barksdale*, 58 Ala. 288.

Affirmed.

## Reynolds et al. v. Simpkins.

### *Attachment for Rent and Advances, instituted before Justice of the Peace.*

1. *Attachment before justice; objections must be made before justice for irregularity in proceedings.*—On appeal to the circuit court, in attachment proceedings commenced before justices of the peace, no objections can be there raised to the irregularity of the proceedings, which was not taken before the justice, although if presented in time it might have been fatal to the proceedings, but a complaint filed in such a case in the circuit court which is only an amplification of that previously filed in the justice's court, is unobjectionable.

2. *Discontinuance; when discontinuance as to one defendant operates as discontinuance to all, and when it does not.*—When several defendants are sued and served with process, a discontinuance as to one of them, without a sufficient legal excuse therefor, operates as a discontinuance of the whole action; but in such a case, when one of the defendants interposes a plea of infancy, or other similar personal defense, the plaintiff may admit its truth and discontinue the case as to such defendant, without prejudice to the case against his co-defendant.

3. *Same; may be entered without prejudice when evidence shows disability.* When, in such a case, the evidence introduced on the trial of a cause, shows that there is no legal cause of action against one of several defendants, by reason of such personal defense of infancy, even though it is not formally presented by plea, the plaintiff may, on motion, discontinue as to such defendant, without prejudicing his case against the other defendants.

APPEAL from the City Court of Selma.  
Tried before Hon. JOHN HENDERSON.

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On October 27th, 1879, J. F. B. Simpkins made an affidavit before a justice of the peace, stating "that Esther Reynolds and George Reynolds were indebted to him in the sum of forty-five dollars for rent, and advances after allowing all just off-sets and discounts, and the said Esther Reynolds and George Reynolds had removed a part of the crop without paying rent and advances." An attachment was issued on the same day against Esther and George Reynolds, and was levied on certain property, as property belonging to the defendants. The plaintiff filed a complaint in the justice's court in these words: "Plaintiff claims of the defendant \$45 for rent and advances from said defendants on, to-wit, October 1st, 1878." The defendants pleaded that they were "not indebted in manner and form as alleged in the complaint." The justice rendered a judgment against the defendants for the debt. The defendants then carried the case, by appeal, to the City Court of Selma, where the plaintiff filed a complaint, containing two counts, the first of which claimed \$25 for "rent of land rented by plaintiff to defendants, and due October first, 1879." The second count claimed \$30 "for advances made during the year 1879, by the plaintiff as landlord to defendants as tenants, to enable them to make a crop on lands in Dallas county, and due October 1, 1879." The defendants demurred to the complaint on the ground that it was a departure from the original complaint, made a new case, and was inconsistent with it. The court overruled this demurrer, and the defendant excepted. The defendant moved to dismiss the attachment, and "dissolve the lien, because the debt on which the attachment was founded was not for rent of land or for advances, and was not a debt for which an attachment was authorized." The plaintiff also moved to quash the attachment. The court overruled these motions, and the defendant excepted. The case was tried by the court without a jury, on the defendant's plea, which avers that "the defendants did not rent the lands in manner and form as alleged." The judgment entry recites the fact that the infancy of George Reynolds had been shown to the court (this entry is set out in the opinion of the court), and thereupon the plaintiff was permitted to amend his complaint by striking out the name of George Reynolds. The defendant then moved to strike the cause from the docket because it was discontinued by this action of the court. The court overruled this motion, and defendant excepted. There was a verdict, and judgment for the plaintiff. The errors assigned are—1. The judgment of the court; 2. The refusal to quash the attachment; 3. Refusing to dismiss the case when there



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was a discontinuance as to George Reynolds without a plea of infancy having been interposed.

SUMTER LEA, for appellant.

PETTUS, DAWSON & TILLMAN, for appellee.

SOMERVILLE, J.—In *Staggers v. Washington*, 56 Ala. 225, it is held, that where an attachment is commenced before a justice of the peace, and an appeal is taken to the Circuit Court, no objection can be there raised to the regularity of the proceedings, which was not taken before the justice's court, although, if presented in time, it might have been fatal to the proceedings.—Code, (1876) § 3693. If there is any force in the objections urged, as presented by the motion in the City Court to *quash*, or the one to *dissolve* the attachment proceedings in this case, they came too late.—*City Court of Selma v. Stewart*, 67 Ala.

The complaint filed in the City Court did not introduce a new case, or cause of action, but was clearly a mere amplification of the informal statement of the same cause of action made in the primary court, in which the attachment was commenced.

It is insisted by appellant that there has been a *discontinuance* of the entire case by reason of the action of the plaintiff in the City Court. The judgment entry contains the following recital: "It appearing from the evidence introduced on the trial of the cause, that George Reynolds was a *minor*, at the time the several contracts sued on, were made, and still is a *minor*, thereupon, on motion of the plaintiff, leave is granted to the plaintiff to amend his complaint by striking out the name of said George Reynolds as a party defendant from the writ of attachment and the complaint; which is done against the objection of the defendants, and the defendants excepted to the ruling of the court."

The rule is, that, where several defendants are sued and served with process, a discontinuance as to one of them, *without a sufficient reason therefor*, operates as a discontinuance of the whole action.—*Whitaker v. Van Horn*, 43 Ala. 255; 1 Chitty Pl. 578.

When a *plea is filed* setting up infancy, bankruptcy, coverture, or other like personal defense, there can be no question of the proposition, that the plaintiff can admit the truth of the plea, and, on application to the court, discontinue as to the defendant who interposes such defense, without prejudice to the *status* of his action against the other co-defendants. *Cuyler v. Coats*, 10 How. Practice Rep. 141; 1 Chitty Pl. 578.

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We see no reason for construing this mere technical rule of pleadings so as to embarrass judicial proceedings and operate with harshness upon litigants. We think, where the evidence introduced upon the trial of a cause shows, to the satisfaction of the plaintiff's counsel and the court, that there is no legal cause of action against one of several defendants by reason of a personal defense, as for example, that of infancy or coverture, even though it is not formally presented by plea, the plaintiff may, on motion, discontinue as to such defendant without prejudice, so far as the others are concerned.—*Pell v. Pell and Wife*, 20 I. 126.

The judgment of the Selma City Court is affirmed.

## Bank of Mobile *et al.* v. Dunn *et al.*

### *Bill in Equity, by Assignees, for Directions as to Execution of Trusts.*

1. *Construction of conveyances, object of.*—The object of all construction of contracts or conveyances is, to ascertain, and if possible, give effect to the intention of the parties, and if that intention is not clearly or distinctly expressed, if the words of the instrument are general, or, if there is ambiguity or expression admitting of two or more constructions, that construction must be adopted which will make the instrument available in all its parts, and for all its purposes, rather than one which would defeat it in any respect.

2. *Assignment for benefit of creditors; construction of.*—Assignments for the benefit of creditors are subject to the same rules of construction which are applied to other contracts or conveyances, and the circumstances surrounding the parties when the assignment was executed, the motives leading to its execution and the objects to be accomplished, should, if there is a want of clearness in its terms, leaving the intention doubtful or uncertain, be regarded in construing them.

3. *Same; description of debts included in.*—No narrowness or closeness of construction is adopted in assignments for the benefit of creditors; if, upon a fair and just interpretation of the terms of description of the debts included therein, they are broad enough to comprehend a particular debt which is not within its precise words, it is sufficient.

4. *Same; rule applied in this case.*—Where a debtor in failing circumstances assigned all his individual property for the benefit of his individual creditors, who were to be paid in full, directing the surplus to be applied equally to the payment of the debt due several named mercantile partnerships, of which he was a member, a debt due by another dissolved partnership not specially named, of which the assignor was a member, and whose debts on its dissolution he assumed and promised to pay, is an individual debt within the terms of the assignment.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

On January 31, 1874, James Crawford, of Mobile, assigned

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all his individual property to W. D. Dunn and W. G. Jones, in trust, for the payment of the debts due by him to his individual creditors, equally and ratably, and if there should be any surplus remaining of the proceeds of such property, after paying his individual creditors, that such surplus should be applied to the payment of the debts and liabilities of mercantile firms, of which he then was, or had been a partner. Schedules of the property conveyed, and of the individual debts of James Crawford were attached to the assignment. The assignees were creditors of James Crawford, and filed their bill, alleging that fact, and many others, to show that they were entitled to be directed by the Court of Chancery, in the proper management and execution of the trusts imposed on them by the assignment. A copy of the assignment was attached to the bill, in which, after reciting that James Crawford had been for many years engaged in business individually in Mobile, and also as member of various mercantile partnerships, which are named, in Mobile and New York, and by reason of losses sustained by these partnerships, had become unable to pay his individual debts and liabilities, and having a large amount of property, and being desirous that all his individual property should be applied to the payment of each and all his individual debts ratably, and that the surplus of such property, if any, after paying such individual debts and liabilities, should be applied to the payment of the partnership debts of the said several mercantile firms, of which he was a member, assigned all his individual property to W. D. Dunn and W. G. Jones to sell as they deemed best, directing them to collect all claims due, &c., and giving them full power as to these matters, and directing that all his individual debts or liabilities should be paid in full, but if such debts were omitted by accident or otherwise from the schedules attached, they were nevertheless to be paid in full, as if they were included therein, and if the money arising from the sale of the property should be insufficient to pay such debts in full, they should be paid *pro rata*. The surplus, if any, after paying the expenses of the trust and the individual debts, should be used for the "payment of the partnership debts of the said several mercantile firms, of which the assignor was, or is, a member." There was a reference to the register to ascertain who were the individual creditors of James Crawford, and he reported a number of names, but reported that the Bank of Mobile, and the Citizens' Mutual Insurance Co. were not individual creditors of James Crawford. The facts in regard to these claims were that they were created originally by James Crawford individually, and that afterwards there was a partnership of



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Crawford & Son, which was composed of James Crawford and his son, Robert C. Crawford, and the notes evidencing these claims were signed James Crawford & Son, and James Crawford assumed all the liabilities of this firm when it was formed, and assumed and promised to pay all the debts when it was dissolved. The Bank and the Insurance Company excepted to the report, but the exceptions were overruled and a final decree rendered, in which their claims were subordinated to the payment of the individual debts. This decree is assigned as error.

OVERALL & BESTOR, for the Bank of Mobile, and HANNIS TAYLOR, for the Citizens' Mutual Insurance Co., insisted that the debts due by James Crawford & Son, were the individual debts of James Crawford, and should be paid as such.

GAYLORD B. CLARK, and FRANK B. CLARK, for appellee. The claims of the Bank of Mobile, and the Citizens' Insurance Company, were presented as debts of the firm of James Crawford & Son, and are partnership debts, and if provided for at all in the assignment are provided for as such. The fact that James Crawford assumed the debts of the firm of Crawford & Son made no difference, for it was only a matter between the two partners, and this is a contest between creditors.

BRICKELL, C. J.—Assignments for the benefit of creditors are subject to the same rules of construction which are applied to other contracts or conveyances. The object of all construction is to ascertain, and, so far as it is possible, to give effect to the intention of parties. If the intention is not clearly and distinctly expressed—if the words of the instrument are general, or, if there is ambiguity of expression, admitting of two or more constructions, that construction must be adopted, in obedience to the maxim, *ut res magis valeat quam pereat*, which will make the instrument available in all its parts, and for all its purposes, rather than a construction which would defeat it in any respect.—*Tarrer v. Rappe*, 7 Ala. 873; *Shackelford v. P. & M. Bank*, 22 Ala. 238. The circumstances surrounding the parties when the assignment was executed, the motives leading to its execution, and the objects to be accomplished, should be regarded in construing it; for, if there is a want of clearness in its terms, leaving the intention in uncertainty or doubt, these may often remove it. Burrill on Assignments, 374.

It is obvious, that when the assignment was executed, Crawford was in failing or insolvent circumstances, and that

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his purpose was the appropriation of all his individual, separate property to the payment of his debts; all property of which he had the sole and exclusive power of disposition, as distinguishable and separable from the property and assets of the several partnerships of which he had been, or was, a member, mentioned in the assignment as then, or previously, existing. There is no reservation, or exclusion, from the operation of the assignment of any other of his property, distinguishable and separable from the property and assets of these partnerships, than such as was by law exempt from the payment of debts. The intent to assign and transfer all such property, subject to the specified reservation, whatever may have been its kind, or whatever the nature of the title to it, is clearly expressed, not only in the recital of the objects, purposes, motives, and considerations leading to the execution, but in the granting clause of the assignment. It is also apparent that the assignment is framed in view of the statute, (Code of 1876, § 2126), which converts every general assignment into an equal security for the benefit of all creditors, annulling all preferences which may be expressed in it. The assignment gives a preference to the separate, individual creditors of the assignor, who are to be fully paid; and then, if there be any surplus of assets, it is to be applied equally to the payment of the creditors of the partnership mentioned. In this respect, the assignment conforms to the principle upon which a court of equity would proceed in marshalling and distributing the joint and separate property of partners, to joint and separate creditors; applying partnership assets first to pay partnership debts; giving the individual creditors of each partner an equal and ratable proportion, with other individual creditors, of the share of such partner in the partnership assets remaining after paying partnership debts, and giving him preference of payment from the individual, separate property of the partner. In other words, first paying partnership creditors from partnership assets, and individual creditors from separate assets. Story on Part. § 363. The only partnership debts for which the assignment provides, and the only debts subordinated in payment, are the debts of the partnerships which are mentioned in the assignment. The words of the assignment, descriptive of the debts secured, or intended to be secured, are, "each and all of his own individual debts and liabilities, and, in addition thereto, the debts and liabilities of the said several mercantile firms."

The point of contention now involved is, whether the debts of a mercantile firm, of which the assignor was a partner, not mentioned in the assignment, which had been dissolved sev-

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eral years prior thereto, the assignor promising, when the dissolution occurred, that he would pay such debts, are *individual debts and liabilities* within the meaning of these terms, as employed in the assignment, entitled to share in the preference created by it. If these debts are not embraced within this description, they are not entitled to share in any event in the distribution of the property assigned; for they are not, certainly, within the other description, *debts and liabilities of the said several mercantile firms* mentioned in the assignment. To this extent, the intention to provide for the payment of all the debts of the assignor, clearly disclosed, in the order in which a court of equity would devote the assets, would be defeated; and it may well be questioned, if the preference created by the assignment would not by the statute be annulled, so far as such debts are affected. The *separate estate* of a partner is that in which his co-partners have not a joint interest with him—in which he has a right and interest disconnected from the partnership; and it may consist of his interests in other partnerships.—Collyer on Part. § 880. So the individual, *separate*, debts of a partner may be the debts of other partnerships than such as are specifically referred to in a particular instrument. These terms, *separate estate*, and *separate* (or individual) debts, may be, and are often, used relatively. Such is the use of the terms *individual* and *partnership* debts, in this assignment; the latter designating all the debts and liabilities of the mercantile firms mentioned; and the former, all other debts and liabilities of the assignor, which are individual debts, in relation to, and distinguished from, the debts of these firms. There is no narrowness, or closeness of construction, of the description of debts in assignments; it is enough that, upon a fair, just interpretation of the terms of description, though not within the precise words, they are broad enough to comprehend the particular debt. Accommodation paper, which the assignor was bound to the parties appearing on the face of it to be solely liable, to pay primarily has been regarded as embraced in the term *debts* by him *due*.—*Bank v. McCalmert*, 4 Rawle, 307. Acceptances of negotiable paper have been regarded as falling within the description of *notes* made or indorsed for his accommodation.—*DeCosta v. Guien*, 7 Serg. & Rawle, 462. It does not require any liberality of construction to understand the words *individual debts and liabilities*, employed in the assignment, as comprehending the debts of James Crawford & Son. They were, as between the assignor and his former partner, strictly individual debts which he was bound primarily to pay; and in the event of his death, and the insolvency of his estate, the partner as to



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such debts would have shared equally with individual creditors in the distribution of his *separate estate*.—*Hogan v. Culvert*, 21 Ala. 194; *Peacey v. Peacey*, 27 Ala. 683. We are of opinion the Chancellor erred in not allowing the appellants to share equally with other individual creditors in the distribution of the funds derived from the assignment.

The decree must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

## Dismukes & Patrick v. Tolson & Barrett.

*Assumpsit for Goods Sold and Delivered, and on Account Stated.*

1. *Shop books; when original entries in are evidence.*—Original entries made in the usual course of business by a party having personal knowledge of the facts, in his own shop books, if such entries are made contemporaneously with the facts to which they relate, and are corroborated by the testimony of the party if living, or by proof of his handwriting if dead, insane, or beyond the jurisdiction of the court, are generally admissible in his favor.

2. *Transactions with deceased persons: purpose and scope of the statute excluding evidence as to by interested witnesses.*—The purpose of the statute, which declares, “that neither party shall testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit,” (Code, § 3058), is to exclude the living from testifying against the dead, who can not be heard in explanation and contradiction, and it applies to all cases involving a direct, immediate conflict of interest between the witness, and the estate of a decedent, where the effect of the evidence is to diminish the rights of the deceased, or of those claiming under him.

3. *Shop books; original entries in, not evidence for party making them against estate of decedent.*—When the vendor of goods dies and his personal representative brings an action against the purchaser for the price, the purchaser can not read in evidence original entries made in his own shop books, in the usual course of trade, showing payment to the vendor; such entries are made contemporaneously, are mere written declarations of the party; are parts of the *res gestæ*, and are properly excluded, as transaction by, or with, a deceased person whose estate is interested in the result of the suit.

APPEAL from Etowah Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was an action brought by J. Patrick and J. F. Dismukes, as administrators of the estate of W. B. Gilliland, against J. D. Tolson and J. D. Barrett, partners trading under the name and style of Tolson & Barrett, in which they claimed \$73.75 as due on account stated between defendants and plaintiff's intestate, and a like sum for corn sold and de-

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livered to them by said intestate. On the trial the defendants admitted the receipt of the corn, and the value, as claimed by the plaintiffs, and that Gilliland died on December 23, 1875. The defendants introduced J. D. Tolson, by whom they offered to show that he was a merchant, and a member of the firm of Tolson & Barrett; that he kept the books of the firm at the time the entries, set out below, were made in the books of Tolson & Barrett; and that he made these entries in the usual course of business. Plaintiffs excepted, severally, and separately, to each portion of this testimony, but the objections were overruled, and the plaintiffs excepted. The defendants then offered to prove by said Tolson that certain books which he produced in court were the books of common entry of Tolson & Barrett, to which plaintiffs objected, but the court overruled the objection, and allowed said Tolson to testify that the said books were the books of common entry of Tolson & Barrett. The defendants then offered to read in evidence an entry from one of these books, which Tolson testified was the "journal," as follows: "Monday, March 9, 1874: To cash paid to Gilliland for corn, \$78." The plaintiffs objected to this entry as evidence in the case, but the court overruled the objection, and defendant excepted. The defendants then offered in evidence an entry from another of these books, which said Tolson testified was the "ledger," and which was as follows: "March 9, 1874: paid Gilliland for corn, \$78." The defendants objected to this entry as evidence, but the court overruled the objection, and defendants excepted. There was a verdict for the defendants. The rulings of the court on the evidence are assigned as error.

AIKEN & MARTIN, for appellants.—Entries made by a tradesman in his books are not admissible in his favor.—*Moore v. Anderson & Bro.* 5 Port. 107; 3 Ala. 642. The entries were the mere written declaration of Tolson himself, and were not admissible.—3 Ala. 519; 9 Ala. 372. In *Richardson v. Dormon*, the court said that the books of a physician are evidence of the items of his account, but that the value of medicines must be left to the jury. If Gilliland himself was the plaintiff in this action, these books would not have been evidence against him.—*Godbold v. Blair*, 27 Ala. 592. Tolson was not a competent witness to prove that the money was paid for the corn, and cannot prove indirectly that which he could not prove directly. The statute is intended to prevent one party to a contract from testifying about it when death has sealed the lips of the other party, and both its

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letter and its spirit was violated by permitting these entries to go to the jury.

DENSON & DISQUE, for appellees.—Tolson was a competent witness to prove that he made the entries as the book-keeper of Tolson & Barrett, in the usual course of business, and that they were the books of common entry. Such testimony involved no statement by, or transaction with, Gilliland, and is not excluded by force of the statute.—1 Whart. on Ev. 516-679; 3 Pick. 96; 15 Am. Dec. 181; *Avery v. Avery*, 49 Ala. 193. Gilliland died on December 23, 1875. The entries were made March, 1874, when Tolson was certainly a competent witness.—*Batre v. Simpson*, 4 Ala. 305. The argument, from necessity, should prevail in this case, for Tolson was a competent witness when he made these entries in the due course of business, and as Gilliland is dead, and appellees cannot have the benefit of his testimony, a failure of justice must result unless these entries can be proven.

SOMERVILLE, J.—The original entries made by a party himself in his own shop-books, are generally held to be admissible in evidence in his own behalf. But to be admissible, they must have been made in the ordinary course of business, contemporaneously with the facts to which they relate, and by one having personal knowledge of the facts; and must further be corroborated by the testimony of the party, if living, or by proof of his handwriting, if dead, or insane, or out of the jurisdiction of the court trying the cause. *Chaffee v. United States*, 18 Wall. 516; 1 Greenl. §§ 118-120; *Union Bank v. Knapp*, 3 Pick. 96; 15 Amer. Dec. 181, and note, 191; *Batre v. Simpson*, 4 Ala. 304; *Avery's Ex'rs v. Avery*, 49 Ala. 193; 1 Whart. Ev. § 678-9.

The question presented for decision in this case is, whether, in a suit brought by an administrator of a deceased person against a defendant, the latter is competent, under section 3058 of the present Code (1876), to prove for himself certain entries made by him, which had reference to a transaction with the deceased during his life-time. The above section removes all incompetency based upon the fact of the witness being a party, or interested in the issue, in other than criminal cases, "except that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatever to the party against whom



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such testimony is sought to be introduced."—Code of 1876, § 3058.

The reason upon which this statute is based seems to be, that there should be no admissibility unless there is mutuality; that when the lips of one party to a transaction are sealed by death, those of the other must in like manner be sealed by law.—1 Whart. Ev. § 466; *Kumpe v. Coons*, 63 Ala. 448. Its purpose and policy is to exclude the living from testifying against the dead, because the latter cannot be heard in explanation or contradiction, and it has been held to apply to all cases involving a direct, immediate conflict of interest between the proposed witness and the estate of a decedent, where the purpose or effect of such evidence is to diminish the rights of the decedent, or of those claiming in succession under him.—*Insurance Company v. Sledge*, 62 Ala. 566; *Key v. Jones*, Adm'r, 52 Ala. 238; *Beadle v. Graham's Adm'r*, (present term, MSS.)

Applying these principles, we do not think that the defendant, Tolson, was a competent witness, under the statute, to prove the various book entries to which he was permitted to testify in the court below. These entries were a mere written declaration of the fact that the defendants had paid for the corn which they purchased from the deceased in his life-time. They were contemporaneous with the principal fact of payment, and are regarded in the eye of the law as *verbal acts*, being part and parcel of the *res gestæ*.—1 Greenl. Ev. § 120. They clearly constituted a part of the transaction with the deceased, and come within the statutory prohibition. To allow a defendant to prove such entries by his own oath, against the estate of a decedent, would be to permit him to accomplish indirectly what he is prohibited from doing directly by the express mandate of the statute.

Reversed and remanded.

## Ferguson et al. v. Morris.

### *Bill in Equity to Enjoin Action of Ejectment.*

1. *Confederate treasury notes; executor or administrator might receive in payment of debts.*—Executors or administrators and other trustees who were clothed with the legal title to the claims due the estates which they represented, might receive Confederate treasury notes in payment of them, and in the absence of fraud, or collusion, the debts were extinguished.

2. *Same; agent or attorney could not receive.*—But an agent or attorney has only a special authority, and is in no sense the owner of the debt, and cannot

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receive in payment of it anything but money, or currency which passed at par, and was considered and treated as money; and the fact that nothing but depreciated currency was in circulation, cannot enlarge his authority in this respect.

3. *Foreign administrators; cannot receive payment of debts until letters recorded in Alabama.* - Foreign administrators, until they have caused their letters duly authenticated, to be recorded where they seek to reduce to possession a chose in action, have no authority to receive payment of it, and payment to them before their letters are recorded is no protection against the claims of creditors or of a domestic administrator.

4. *Principal; cannot authorize agent to do that which he cannot do himself.* - A principal cannot confer on an agent authority to do that, in his behalf, which he himself could not do if he were personally present and acting for himself.

5. *Vendee paying debts of vendor's estate in depreciated currency entitled to credit.* When, on a bill filed to enjoin an action of ejectment by the heirs of a vendor against a sub-vendee who holds under an executory contract, it appears that such vendee had used depreciated currency collected by him as agent of the administrators of the vendor's estate, in paying the debts of such estates, he will be credited with such payments, and has an equity to redeem on payment of the purchase-money.

#### APPEAL from Talladega Chancery Court.

Heard before Hon. N. S. GRAHAM.

On the 4th day of March, 1871, W. A. Morris filed this bill against Sarah B. Ferguson and others, to enjoin an action of ejectment instituted by them, as the heirs at law of Jos. W. Ferguson, deceased, for the recovery of certain lands described in the bill. About the first of October, 1860, Jos. W. Ferguson, the father of appellants, sold six hundred acres of land in Talladega county to Ben. F. Sawyer for \$5,100. A note made by B. F. and Elbert H. Sawyer, due October 1, 1861, with interest from date, was taken for one-half the purchase-money, and the other half was paid in cash. About the 20th of February, 1861, Jos. W. Ferguson and wife executed a deed, conveying said land to B. F. Sawyer, and placed it in the hands of W. D. Caldwell, with instructions to deliver it to Sawyer, on payment of the purchase-money note which was placed in his hands at the time for collection. He also delivered to Caldwell at the same time another note, on Sawyer for \$114, and other notes on various persons instructing him to collect them, and to pay out of such collections as he might make, certain debts to Dr. Gorman and others, and to pay over to him any balance left after such payment. Ferguson removed to Texas, where he died in November, 1861. In December, 1861, Jas. and Isaac Ferguson were appointed administrators of the estate of Jos. W. Ferguson, by a court in Texas. On the 4th of February, the administrators wrote to Caldwell, authorizing him to collect and close up, and receive all moneys due the estate of Jos. W. Ferguson. On May 19, 1862, Caldwell being about to enter the army, placed all the notes which he had received from Ferguson, and also the deed to Sawyer, in the hands of

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appellee, Morris, giving him the same instructions in regard to collecting them, and the disposition of the money, as he had received from Ferguson, and afterwards from the administrators of his estate. In June, 1862, Sawyer sold to Morris four hundred and fifty acres of the land which he had purchased from Ferguson for \$5,100, and Morris gave his note for that amount to Sawyer. This note was payable January 1, 1863. Sawyer also gave Morris a bond for title upon payment of the purchase-money. On January 3, 1863, John Sawyer, as agent of B. F. Sawyer, called on Morris, laid on the table a deed made by Benjamin F. Sawyer and wife to Wm. A. Morris, and the note made by Morris to Benjamin F. Sawyer for \$5,100 for the land, and said that he had come to collect the note, deliver the deed, take up Benjamin F. Sawyer's bond, and deliver the possession of the land to Morris. Thereupon Morris laid on the table a package containing \$5,100 in Confederate money and B. F. Sawyer's bond, and said, "there is your money, count it." John Sawyer picked up the package of money, and ran his hand over the end of it once or twice, and then looked into Morris's face, and said—Morris, have you got Ben Sawyer's note to Wm. Ferguson in your possession? To which Morris replied that these notes were in his desk. John Sawyer then said to Morris that Ben Sawyer had instructed him to get up those notes if Morris had them; and further said to Morris, "what is the use of my counting the money, and then having to count it right back to you?" Then Morris produced the two notes of B. F. Sawyer to J. W. Ferguson, one for \$2,500 and one for \$114 or \$115. Morris counted the interest on the large note. Sawyer counted the interest on the small note. The amount of the two notes were added together and deducted from the \$5,100, and the balance due on this note was then counted out of the package of Confederate money by John Sawyer. The two notes on B. F. Sawyer in favor of J. W. Ferguson, were handed to John Sawyer by Morris, with B. F. Sawyer's bond for title, and John Sawyer delivered to Morris the note in favor of B. F. Sawyer on Morris for \$5,100, B. F. Sawyer's deed to Morris, and delivered to Morris the possession of the land. Morris collected some other Confederate money for Ferguson and for the administrators, on the other notes in his hands, and out of it paid the debts which he had been instructed to pay by Caldwell. The money for the notes of Sawyer, for the land, was never paid over to the estate of J. W. Ferguson.

On July 29, 1870, Sarah B. Ferguson, and others, brought an action of ejectment in the Circuit Court of Talladega county, against W. A. Morris, to recover the four hundred



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and fifty acres of land sold by Sawyer to said Morris. This suit was pending when the bill was filed. A temporary injunction was granted on the filing of the bill.

The respondents moved to dismiss the bill for want of equity. The Chancellor refused this motion, and on the hearing rendered a decree perpetually enjoining the respondents from prosecuting the action of ejectment against W. A. Morris. This decree, and the refusal to dismiss the bill for want of equity, are assigned as error.

JOHN T. HEFLIN, for appellants.—Caldwell's power to collect the purchase-money note made by Sawyer ceased on the death of Ferguson, the principal, and he could not delegate it to Morris.—*Cunningham v. Johnson*, 1 Ala. 240; *Reynolds v. Scarbrough*, 12 Ala. 252. The claim of the appellee to the land in controversy has no foundation in justice. He undertook the collection of a note which was a lien on the land, of which he had notice, and soon afterwards purchased the land, agreeing to pay the note, which was a lien on the land. On January 3, 1863, he says that he paid for the land in Confederate money, on the note that bound the land. The appellants insist that the note was converted by being used to pay for the land. The appellee assumed incompatible duties in blending his individual interest with the trusts attaching to the position in which he was acting, which disqualified him to bind the *cestuis que trust*. He had no authority to collect a depreciated currency.—Story's Agency, § 181 and notes, § 215; *Ball et al. v. West, Oliver & Co.* 12 Ala. 330; *Chapman, Lyon & Noyes v. Cowles*, 41 Ala. 103; *Aicardi v. Robbins*, 41 Ala. 541; *Cooney v. Wade*, 4 Hump. 444; *Kenny v. Hazleton, Haddock & Co.* 6 Hemp. 62. The collection of solvent claims in Alabama by an agent in currency greatly depreciated and daily depreciating, when the persons to whom the money belonged were in Texas, and the blockade of the Mississippi rendered the transmission of the funds to the beneficiaries thereof impossible, was "reckless and improvident," and renders the agent liable for the loss of the funds.—*Gibbs v. Gibbs*, Phillips N. C. Rep. 471-2; *Emerson v. Mullett*, Phillips N. C. Equity R. 234. The purchase-money due to the estate of the appellants' father, being lost by the negligence and fraud of the appellee, when he claims the land, they may defeat his suit on the ground that his acts, wrongful in themselves, have caused the loss of the purchase-money. *Vide, Long v. Waring*, 25 Ala. 625, which is a case directly in point.

PARSONS & PARSONS, for the appellee.—The administrators  
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had the right to collect the debts of the estate in Confederate money, and such collections are binding on the estate. The administrators had the same power over the choses in action of the intestate, as if they had been appointed in this State. *Broughton v. Bradley*, 34 Ala. 694. And they had the right to sue as administrators without taking any preliminary step. *Manly v. Turnipseed*, 37 Ala. 529; *Bell's Adm'r v. Nichols*, 33 Ala. 679. After the payment of J. W. Ferguson's debts, his personal property would be distributed by the Texas court. *Harrison v. Mahorner*, 14 Ala. 829. Sawyer's note was personal property, and in legal contemplation attended the person of J. W. Ferguson, and hence was in Texas.—10 Pick. 100. A man may do voluntarily that which the law will compel him to do.—49 Ala. 137. The title of the administrators to the personal property was exclusive.—9 Ala. 408; 16 Ala. 494; 18 Ala. 9. They could compel payment of the note due by Sawyer for the purchase-money of the land, and Ferguson's debtors had the right to pay him while he was living, or his representatives, or their agent, after his death. The administrators had full power over the choses in action of the decedent—could compromise or settle them.—*Waring v. Lewis*, 53 Ala. 615. J. W. Ferguson, who removed to Texas during the war, when Confederate currency was the only money in circulation, had instructed Caldwell to *collect* all the notes left with him, and among them was a note for the purchase-money of the land in controversy. The administrators renewed Caldwell's agency, and gave him the same instructions, and when Caldwell turned the notes over to Morris, he gave him the same instructions. When Morris received the Confederate money in payment of Sawyer's notes, he did no more than the administrators would have done if they had been present, and they had undoubted right to collect Confederate money. Indeed, they could collect the notes in nothing else, and of this fact the court takes judicial knowledge.—23 Ala. 33; 40 Ala. 391.

BRICKELL, C. J.—The legal estate in the premises in controversy resided in Joseph W. Ferguson, the ancestor of appellants, at the time of his death. It was not divested by the sale to Sawyer, or the bond he executed with condition to make titles on the payment of the purchase-money. The sale, coupled with the bond, created but an equity, imperfect until the purchase-money was finally paid. The appellee, who by his purchase and the conveyance to him, has succeeded to Sawyer's rights under his contract of purchase, and to his interest in the lands, is also subjected to his duties and liabilities. As Sawyer could not have claimed that the

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legal estate residing in the ancestor, and *eo instanti* his death, descending to the appellants, should be divested, until there was full payment of the purchase-money, according to the terms of his contract of purchase, the appellee can have no other or higher claim. The question decisive of the case, in any of its aspects, is whether there has been payment of the purchase-money, either by Sawyer, or by the appellee; and that question can not be answered otherwise than in the negative.

If we assume that the appellee stood in the relation of agent of the administrators of the ancestor, appointed and residing at his domicile in Texas, and that they could have clothed him with authority to collect Sawyer's note for the purchase-money of the lands, he would not have been authorized to receive in payment any thing else than money, and, certainly, not his own debt. The law would have confined and limited him to a collection of the purchase-money, in that which was a legal tender for the payment of debts, or that currency which, passing at par, was considered and treated as money.—*Ward v. Smith*, 7 Wall. 447; *Chapman v. Cowles*, 41 Ala. 103; *West v. Ball*, 12 Ala. 340. Whatever may have been the usage, or custom, or necessities of business, at the place of residence of Sawyer and the appellee, though there may have been no other than a depreciated currency in circulation, fluctuating in value with the fortunes of war, thereby the authority of the appellee was not enlarged. It was not capable of modification, or change, or adaptation, to meet such events, whether the probability is that they were foreseen or unforeseen by the principals. If they required new or other authority than that which the principals had conferred, it was for them alone to determine, whether authority adapted to them should be given, or whether they would repose on the authority which had been given, awaiting results and future events.—*West v. Ball*, *supra*; *Alley v. Rogers*, 19 Gratt. 366; *Evart v. Sanders*, 25 Gratt. 23. It is alike unreasonable and unjust to suppose that the principals, residing in Texas, to whom prompt and safe transmission of funds under the circumstances existing, when it is claimed the purchase-money due from Sawyer was paid, could have contemplated or intended to authorize its payment in a currency of such uncertain and evanescent value, as were Confederate treasury-notes. Their value was really dependent upon the immediate uses to which they could be applied. And it may, or may not, be true that if payment of them could have been made to the principals, when it is claimed they were received by the appellee, that they would have been accepted, and could have been advan-



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tageously employed for the benefit of the estate of their intestate. They had not the opportunity of accepting and using them, and it is useless to speculate upon what they would have done, if it had been afforded.

We are not departing from, nor do we intend any modification of, our repeated decisions, that if debts were paid to an executor, administrator, or other trustee, clothed with the legal title to them, in Confederate treasury-notes, in the absence of fraud or collusion, the debt is extinguished. The distinction and difference, clear and marked, between that class of cases and the present, was pointed out in *Waring v. Lewis*, 53 Ala. 632. An attorney, or agent for collection, is in no sense an owner of the debt—he has but a special authority, and all who deal with him must, at their own peril, inquire into and ascertain its nature and extent. There can be no presumption that it extends beyond the reduction of the debt into money, or that which, because it circulates at par as money, has by general consent in the transaction of business, the qualities and uses of money. An executor, administrator, or other trustee, clothed with a legal title to choses in action, of which the power of disposition is an incident, is not in any sense an agent, nor as an agent is he confined and limited in authority and duty. It is his duty to collect the choses in action; to reduce them into possession; and he may do whatever his judgment may dictate, subject only to his liability to his *cestui que trusts* for his good faith and diligence.

But it was not competent for the administrators appointed in Texas, deriving authority only from letters of administration there granted, by the mere force of such letters, to collect or receive the purchase-money of the lands due from Sawyer. Until they had caused the record of their letters, duly authenticated, to be recorded in the probate court of the county in which they sought to reduce to possession the choses in action of the intestate, and given bond as required by the statute, they were without authority to receive payment of such choses in action; and a payment to them would have been unavailing against the claim of a domestic administrator, or of creditors, or next of kin.—Code of 1876, §§ 2637-40; *Hatchett v. Berney*, MSS. A principal can not confer authority on an agent to do that in his behalf which he has not the ability to do for himself, if personally present and acting. Beside, it is clear, that the appellee was not the agent of the foreign administrators—from them he derived no authority, nor had they any voice in his selection. Whatever of authority he exercised, was derived from the delegation of Caldwell, who had himself a bare power or authority,

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incapable of delegation without the consent of his principals. Story on Agency, § 13; *Johnson v. Cunningham*, 1 Ala. 249; *Couthway v. Bergham*, 25 Ala. 393; *Hitchcock v. McGehee*, 7 Port. 556. Without dwelling now upon other facts in the case, which seem to indicate that Sawyer's debt was paid only by an extinguishment *pro tanto* of the debt due to him from the appellee, and which it would not be insisted could operate as a payment, entitling the appellee to a divestiture of the legal estate residing in the appellants, for the reasons stated, we must pronounce that debt unpaid, and that the appellee's claim to relief can not be supported.

So far as the appellee paid debts of the intestate, if he had not other funds which were, or ought to have been, appropriated to that purpose, he is entitled to a credit for them in the computation of the debt of Sawyer, and has an equity to redeem on paying that debt. By the amendment of the bill, the equity may be asserted, and we remand the cause, that he may, if he so elects, have the opportunity of amendment.

Reversed and remanded.

## Lehman et al. v. Meyer et al.

### *Bill in Equity by Simple Contract Creditors to reach Property Fraudulently Conveyed by Debtors.*

1. *Error not noticed unless assigned.*—Error apparent on the record, but not assigned, is not noticed unless it be a want of jurisdiction over the subject-matter in the primary court, which compels a reversal; and except under special circumstances, without remanding the case.

2. *Same; when presumed to be waived.*—All errors, except a want of jurisdiction, may be, and are presumed to be, waived, if they are not assigned, and in civil cases, the court may, in its discretion, refuse to notice errors assigned, but not insisted on in argument.

3. *Creditors at large; had no relief in equity against debtors' fraudulent transfers.*—Before the passage of the statute (Code, § 3886) equity would not interfere to relieve creditors at large against fraudulent transfers made by debtors, until they had reduced their claims to judgment.

4. *Judgment creditors; when relief granted to in equity against debtors' fraudulent conveyance.*—Equity would assist judgment creditors in obtaining satisfaction in two classes of cases: 1. When the debtor fraudulently conveyed property on which the judgment was a lien. 2. To reach property not subject to execution at law; but in the second class the creditor must, before resorting to equity, have exhausted his legal remedies, while in the first class, he need not have done so.

5. *Decedent; equity grants relief to creditors against fraudulent transfers made during life.*—Equity would also interfere for the relief of creditors who had not reduced their claims to judgment, or exhausted legal remedies, where a debtor had made fraudulent transfers of his property in his life time, and the remain-

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ing assets were insufficient for the payment of his debts. But this jurisdiction depends on the power of the court to marshal the assets of deceased persons, and was independent of the jurisdiction to which the creditors of a living man could resort.

6. *Simple contract creditors; statute extending relief to, against fraudulent transfers by debtor construed.*—The statute (Code, § 3836) allowing creditors without a lien to go into equity to reach property fraudulently transferred by debtors, is remedial, and must be construed in the light of the pre-existing law, and given effect according to the legislative intention; thus reading and construing it, simple contract creditors have the same right under it, as judgment creditors would have had before its enactment, to invoke the aid of equity to reach property fraudulently transferred.

7. *Property fraudulently conveyed may be pursued in equity by creditors, although the creditor has other property.*—Although it may appear on a bill filed by simple contract creditors to reach property fraudulently conveyed by the debtor, that the latter has other property sufficient to pay the debt, yet the creditor may pursue such property, and the fraudulent grantees can not compel a marshaling of the assets, so as to relieve the property not conveyed before charging the property claimed by them.

8. *Double aspect; bills may be framed with.*—Bills in equity may be framed in a double aspect when each alternative would be the foundation for the same relief; but two inconsistent, repugnant claims to relief, founded on different states of fact, and each, if true, entitling the complainant to relief of a wholly different character, cannot be asserted in the same bill.

9. *Bill seeking to set aside mortgage as fraudulent, or to have it declared a general assignment, demurrable.*—A bill praying that if a mortgage of property by the debtor be not found fraudulent, it may be held to operate as a general assignment, enuring to the benefit of all the creditors of the grantor equally, is demurrable.

10. *Case overruled.*—The case of *Cranford v. Kirksey*, 50 Ala. 590, which asserts the converse of the proposition stated above, is overruled.

11. *Creditor's bill; when not demurrable, though praying that mortgage may be held fraudulent, or held to operate as a general assignment.*—A creditor's bill seeking to declare a conveyance fraudulent and void, which prays that if it should be found fraudulent, it may be held to operate as a general assignment, without stating any facts which would authorize this relief, is not demurrable.

12. *Distinct matters; must not be conjoined in bills.*—That a bill should not join distinct or independent matters, or defendants, against whom the complainant may have distinct and independent demands, is a general rule; but when a demurrer should be sustained on either of these grounds, is matter of doubt, and it is impossible, from our decisions, to state a rule which will apply to the varying exigencies of particular cases—this must be determined alone by reference to the averments and prayer of the bill.

13. *Creditor's bills; defendants to, may be persons who hold property under several distinct conveyances.*—In creditors' bills, persons holding portions of the debtor's property, under separate and distinct conveyances, may be joined as defendants. The object of the bill is single, the satisfaction of the debt out of the debtor's property; and when such a bill charges specifically that the defendants entered into a combination to defraud complainants, and that several transactions, against which relief is sought, were but parts of the same plan and scheme, in which all the defendants joined, and under which the debtor conveyed his property by separate mortgages to different persons, it is not subject to demurrer.

14. *Chancellor's decree prima facie correct; error must be shown.*—When, in a creditor's bill, the evidence is conflicting as to fraud in the conveyances which are sought to be set aside on that ground, the decree of the Chancellor declaring such conveyances fraudulent, is presumed to be correct, until the party assailing it repels this presumption; and it will not be disturbed when, as in this case, this court is not satisfied that his decree was erroneous.

APPEAL from Dallas Chancery Court.  
Heard before Hon. CHARLES TURNER.



[Lehman et al. v. Meyer et al.]

This was a bill in equity, filed December 14, 1878, by M. Meyer and S. Sterne, partners, under the firm name of M. Meyer & Co., and several others, against Solomon Lehman and S. Kahn, partners, trading under the name of Lehman & Kahn, and Edward Kahn and Alexander Katzenberg, trading under the name of Ed. Kahn & Co., and Hardy Hirschler. It is alleged in the bill that said Alexander Kahn, and said Katzenberg became indebted to the complainants in the summer and fall of 1877, in certain specified sums for goods sold and delivered to them; that on Nov. 30, 1878, Ed. Kahn & Co., made a promissory note for \$3,466.77, payable to S. Lehman Nov. 1, 1879, and executed on the same day a mortgage on all their stock of goods in the store where they carried on business in Camden, Wilcox county, stipulating therein, that they should be allowed to go on as merchants and sell the goods in the usual mercantile way; that on the same day Ed. Kahn made a promissory note for \$1,760, payable to Nathan Kahn, Nov. 1, 1879, and executed a mortgage on the same stock of goods to secure it, which mortgage also contained the same stipulations as to selling as the other one; that both mortgages were delivered for registration to the judge of probate of Wilcox county; that these mortgages were prepared in carrying out a fraudulent conspiracy formed by said Lehman, N. Kahn, E. Kahn, and said Katzenberg, to hinder, delay and defraud complainants, and the other creditors of Ed. Kahn & Co.; that said Lehman and N. Kahn, about Nov. 1, 1876, sent one Hoffman to Oxford, Ala., with a stock of goods, and began, through him, a mercantile business there, but about July 7, 1877, sold said goods to Hoffman and Hardy Hirschler for \$1,300, of which six hundred dollars was paid in cash; that Hoffman & Hirschler continued to buy goods from Lehman & Kahn, and bought from no one else; that said firm of Hoffman & Hirschler did not, at any time, up to April 1, 1878, owe Lehman & Kahn less than about \$3,000; that in August, 1877, Lehman & Kahn instructed Hirschler & Hoffman to remit them no more money until further instructions, and about two weeks afterwards instructed them to remit all the money they had on hand to Mrs. Hirschler, the mother of Hardy Hirschler, in the care of Lehman & Kahn. Hoffman & Hirschler sent about \$800 to Mrs. Hirschler. In the fall of 1877 Lehman & Kahn filed their petitions in bankruptcy, as the bill avers, fraudulently omitting from their schedules of assets, the indebtedness of Hoffman & Hirschler to them; that Lehman & Kahn afterwards obtained their discharge, and in April, 1878, by agreement, took the stock of goods still in the hands of Hoffman & Hirschler, in satisfaction of the amount

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due them ; that said stock of goods was shipped back to Selma, and Lehman (Nathan Kahn having sold out his interest to him), used it as a nucleus to begin business with ; Hardy Hirschler, who was a cousin of Lehman, being thus left without means, went to Wilcox county, and formed some sort of business connection with Ed. Kahn & Katzenberg, and established a store near Camden—the purpose of Ed. Kahn & Co. being to buy goods on credit, and secretly place them in the hands of Hirschler under a simulated sale to him, and thus defraud their present and future creditors ; that in pursuance of this plan Ed. Kahn & Co. purchased of complainants goods to the amounts stated in the bill, and had secretly sent many of them, and also other goods, to said Hardy Hirschler, who now held possession of them under a secret agreement to hinder, delay, and defraud complainants ; that in further pursuance of this plan, Ed. Kahn & Co. prepared the promissory notes and executed this mortgage to Lehman & Kahn, embracing all the property subject to the payment of debts, which they owned, except the goods in the hands of Hirschler. That shortly after the making of the notes and mortgages, Ed. Kahn & Katzenberg pretended to dissolve partnership, or connection with said Hirschler, and to have sold to him their interest in the goods in his hands, which were of considerable value ; that Ed. Kahn & Katzenberg were insolvent at the time these purchases were made from complainants, and when the note and mortgages were made to Lehman & Kahn, who knew this fact ; that Kahn & Company were rapidly selling off their goods, and those in the store of Hirschler were also rapidly disappearing. The bill prayed that the mortgages be set aside and declared fraudulent and void, and the property therein conveyed be subjected to the payment of the debts due complainants ; that a receiver be appointed to take charge of the goods of Ed. Kahn & Co., and those also in possession of Hirschler ; that if the mortgages should be held valid, that they may be declared to operate as a general assignment enuring to the benefit of all the creditors of Ed. Kahn & Co. The defendants demurred to the bill on the following grounds : 1. That under the allegations of the bill the complainants have an adequate remedy at law. 2. Because the bill shows that Ed. Kahn & Co. had other property of greater value than the amount of the debts due complainants. 3. Because the bill seeks to have the mortgages therein described declared fraudulent and void, and yet prays that they may be held to operate as a general assignment. 4. That the bill fails to show that Lehman & Kahn had any interest in the property transferred to Hirschler by Kahn & Co., or took any part in

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the transaction between Hirschler and Ed. Kahn & Co., or that Hirschler had any interest in the business of Lehman & Kahn, or that Hirschler participated in any design to hinder, delay, or defraud complainants or the creditors of Ed. Kahn & Co. The Chancellor overruled the demurrer, and denied a motion to dismiss the bill for want of equity. He also made an order, after hearing a motion for that purpose, on affidavits, appointing a receiver to take charge of the stock of goods, and other assets of Ed. Kahn & Co., which were in their store in Camden, Alabama, where they carried on business, and also all the goods and other assets at the store near Camden, "where Ed. Kahn, Alexander Katzenberg, and Hardy Hirschler, lately carried on business." The testimony on the question of fraud, *vel non*, was voluminous and conflicting, but no statement of it need be given, as the conclusion reached by the Chancellor, and sustained by the court on appeal, was that the case made by the bill had been substantially proven. The Chancellor decreed that the mortgages described in the bill were fraudulent and void, and subjected the property conveyed by them, and that attempted to be transferred to Hirschler, to the payment of the debts due complainants. The errors assigned are: 1. The decree overruling the demurrer to the bill. 2. The decree denying the motion to dismiss for want of equity. 3. The final decree in the cause.

JOS. F. JOHNSTON, and E. W. PETTUS, for appellants.

BROOKS & ROY, and WHITE & WHITE, for appellees.

BRICKELL, C. J.—It is not the practice to notice any errors apparent on the record which are not assigned, unless it be a want of jurisdiction of the subject-matter in the primary court, necessitating in any event, a reversal of the judgment or decree, and which would not, except under special circumstances, if there was an absence of jurisdiction, be followed by remanding the cause. All other errors may be waived, and the waiver is presumed, if there is an omission to assign them.—*McDaniel v. Mocdy*, 3 Stew. 314; *Evans v. St. John*, 9 Port. 186. And in civil causes, it is within the discretion of the court whether it will notice errors assigned, but not insisted upon in argument.—1 Brick. Dig. 102, § 285. No one of the assignments of error require that the court should consider whether the receivership is not broader than is warranted by the averments of the bill, drawing into the custody of the court, property which could not by the court in this bill properly be subjected to the payment of the de-



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mands of the complainants, who stand only as simple contract creditors. Without approving or disapproving the authority conferred upon the receiver, we pass to a consideration of the errors assigned. The first of these refer to the decree overruling the demurrers to the bill, and the motion to dismiss it for want of equity.

As we have said, the complainants are simple contract creditors, who have not reduced their demands to judgments at law, and the object of the bill is to reach personal property subject to levy and sale under execution at law, upon allegations that it has been by their debtors transferred with the intent to hinder, delay, and defraud them. A court of equity, in the exercise of its original jurisdiction, would not intervene to relieve simple contract creditors, or creditors at large, (for so they are indifferently termed), until they reduced their demands to judgments at law. Until then the creditor had not established the justness of his demand, and that he really was a creditor, with a right to inquire into the fairness and validity of the dispositions of property the debtor may have made. Unless, as it was justly said, he had a certain claim upon the property of the debtor, he had no concern with his frauds.—*Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Reese v. Bradford*, 13 Ala. 837; *Sanders v. Watson*, 14 Ala. 198. Having obtained judgment and execution at law, there were two classes of cases in which a court of equity would intervene to assist the creditor in obtaining satisfaction. The first was, when there was a fraudulent conveyance or transfer of property, upon which the judgment, or the execution, would operate a lien. Under the statutes formerly existing, the judgment, from the day of its rendition, was a lien on lands coextensive with the State, and the execution on goods and chattels within the county to which it was issued, from the day of its delivery to the sheriff. In this class of cases, without waiting until there was a return of execution, *no property found*, the court would aid the creditor by removing the transfer, or conveyance, fraudulently or inequitably interposed, obstructing or embarrassing the fair and complete execution of the process at law. The other class of cases, was, when the creditor sought the assistance of the court to reach assets not subject to execution at law. In this class of cases, the court would not interfere until the creditor had exhausted his legal remedies—had execution returned *no property found*, for until then, it could not be known the remedy at law was inadequate. *Kirkman v. Vanleer*, 7 Ala. 217; *Dorgan v. Waring*, 11 Ala. 988; *Williams v. Brown*, 4 Johns. Ch. 682; *McDermott v. Strong*, *Ib.* 687; *Beck v. Burdett*, 1 Paige 305. There was

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another class of cases dependent upon the jurisdiction of the court over the administration and marshaling of the estate of deceased persons, in which the court was accustomed to intervene for the relief of creditors, though judgments at law had not been obtained and legal remedies had not been exhausted, if a necessity existed; and the necessity existed, when there was a deficiency of other assets for the payment of debts. This class of cases embraced fraudulent alienations made by the debtor in his life, and depended upon a jurisdiction of the court, distinct and independent of that to which the creditor of a living man could resort.—*Pharis v. Leachman*, 20 Ala. 662; *Watts v. Gayle*, *Ib.* 817; *State Bank v. Ellis*, 30 Ala. 478; *Quarles v. Grigsby*, 31 Ala. 172; *Saltmarsh v. Smith*, 32 Ala. 404; *Todd v. Neal*, 49 Ala. 266; *Halfman v. Ellison*, 51 Ala. 543.

In the two classes of cases to which we have just referred, the law was regarded as defective; and there have been several statutes enacted with a view to cure the mischief. The one now material, and upon which the jurisdiction of the court must depend, reads as follows: "A creditor without a lien may file a bill in Chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor."—Code of 1876, § 3886. The statute is remedial—its manifest purpose is to enlarge the jurisdiction of the court of chancery, and to afford creditors a remedy for the redress of injuries to them, which they had not under existing laws. Without entering upon, or invoking, that vague, undefined, and indefinable doctrine of construing remedial statutes largely and beneficially, it is enough to say, that the construction it must receive must give it effect, according to the legislative intention. The legislative intention must be collected from its words, and these words must be read in the light of, and in connection with, the pre-existing laws. Reading and construing them in the light of, and in connection with, pre-existing law, we can not doubt that the intention of the legislature was to draw simple contract creditors, or creditors at large, creditors who had not reduced their demands to judgments at law, within the jurisdiction courts of equity originally exercised for the assistance and relief of judgment creditors only. In other words, when the debtor by a fraudulent transfer or conveyance had offended the rights of all creditors, whether judgment creditors, or creditors at large, that all should have in equity the same right to invoke its removal. It may be supposed the term *creditor without a lien*, employed in the statute, is rather indefinite; and was intended as an expression that the creditor at large should

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resort to equity only when, if he had a lien, he could invoke the aid of the court for its enforcement. But the real meaning of the statute is, that a simple contract creditor, or a creditor at large, not having a lien by operation of law, shall have an equal right with a creditor having such lien, through the aid of a court of equity, to reach property subject to the payment of debts, which has been fraudulently transferred. *Evans v. Welch*, 63 Ala. 250. Property subject to levy and sale, upon which a judgment, or execution at law, would operate a lien, may be reached. So may property not subject to execution at law, on which the lien of the judgment or execution would not operate, and which the judgment creditor could not reach until there was an exhaustion of legal remedies. The real purpose of the statute is to dispense with, and to abrogate wholly, the pre-existing law, which required that there should be a judgment at law, or if a judgment and the assets transferred fraudulently, were not subject to execution, that there should be an exhaustion of legal remedies, before the court would intervene to avoid fraudulent transfers and conveyances. That rule is blotted out, and any creditor may now, and has an equity of right to, invoke the assistance of the court to avoid such transfers or conveyances. The present bill, consequently, in its several parts, or rather so far as it seeks to avoid the mortgages, and the transfer to Hirschler, whether that transfer was in writing, or rests merely in parol, contains equity. These mortgages and the transfer are averred, with a statement of numerous facts and circumstances, in support of the averment, to have been but parts of a general plan and scheme of the debtors to hinder, delay, and defraud their creditors.

It may appear from the bill that the debtors had property other than that transferred or conveyed by the mortgages of value sufficient to pay the debts of the complainants. If that be so, it is not a reason for arresting them in the pursuit of property the debtors have transferred or conveyed with intent to defraud them. Nor have the fraudulent transferees or grantees any equity to compel a marshaling of the assets, and the exhaustion of such as were not transferred or conveyed before charging the property claimed by them.

Bills in equity may be framed in the alternative, or as it is usually expressed, with a double aspect. But by this it is not intended that a complainant can introduce into the bill, too inconsistent, repugnant claims to relief founded on different states of fact, and each, if true, entitling him to relief of a wholly different character. Each alternative must be the foundation for precisely the same relief.—*Micou v. Ashurst*, 55 Ala. 607; *Shields v. Barrow*, 17 How. U. S. 130; *Rives v.*



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*Walthall*, 38 Ala. 329; 1 Dan. Ch. Pr. 385. A complainant cannot assert a will to be invalid, claim that the court, in cases of which the court has jurisdiction, shall declare it void, or, if that be not true, that there may be under a decree of the court partition of lands devised to him and others jointly. *McCosker v. Brady*, 1 Barb. Ch. 329. It is, too, an established doctrine of a court of equity, that when a party sets up a case of actual fraud, making that the primary ground of relief, he cannot entitle himself to a decree by proof of facts which, independent of fraud, may create a case in which relief would be granted.—1 Dan. Ch. Pr. 328. If, by the statements of the bill, it was shown that the mortgages and transfers covered substantially all of the property of the debtor, and that the transfer to Hirschler was a security for a debt, and not an absolute sale, and affirmed the validity of these transactions, followed by the alternative prayer, that if they were not found fraudulent, they should be declared to operate as a general assignment enuring to the equal benefit of all creditors, the bill would be subject to demurrer. It would present independent, inconsistent, repugnant titles to relief; and if it were confessed, it would be mere matter of speculation and conjecture with the court, as to which of the titles should be made the foundation of relief. We are aware that in *Crawford v. Kirksey*, 50 Ala. 590, it was held that a creditor's bill could be filed in the alternative—in one aspect assailing conveyances as fraudulent, and in another, asserting their validity, and that they constituted a general assignment enuring to the equal benefit of all creditors. We feel constrained to depart from, and to overrule that case upon this point. But this bill, though there is a special prayer that the mortgages, if not found fraudulent, may be declared to operate a general assignment (and the prayer is confined to the mortgage alone, not extending to the transfer to Hirschler), does not aver facts which would authorize that relief. The prayer is, therefore, merely impertinent, could not be made the basis of relief, and does not render the bill demurrable.—*Rives v. Walthall*, *supra*.

The rule is general, that a bill should not join distinct and independent matters, or defendants against whom the complainant may have distinct and unconnected demands. When a bill will be subject to demurrer on either of these grounds, is a question of unmixed doubt and difficulty, on authority. It seems most generally to have been decided upon considerations of convenience, in view of the facts of the particular case, rather than in obedience to any fixed, invariable rule. 1 Dan. Ch. Pr. 335 *et seq.*, and notes. From our own decisions, it is simply impossible to collect a general rule which

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could be made applicable to the varying circumstances of particular cases. In some cases the court seem to have insisted rigidly upon a rule that would exclude the union in one bill of matters not having a direct, immediate connection, in all of which the defendants had not a common interest. In others, they seem to have considered only what was just and convenient in the particular case, while avoiding a multiplicity of suits, also avoiding compelling defendants into litigation of matters in which they had no interest, embarrassing them in defense of the matters in which they are interested.—1 Brick. Dig. 619, §§ 1158–1200. Whether a bill is in this respect demurrable, or subject to objection by plea, or answer, must be determined by reference alone to its averments and prayer.—*Halsted v. Sheppard*, 23 Ala. 558; *Hardin v. Swoope*, 47 Ala. 273.

The bill before us, with specific averments, charges the defendants with a confederation to defraud the creditors of E. Kahn & Co., and that the several transactions against which relief is sought, were but parts of the plan and scheme in which all joined. Its purpose is to obtain satisfaction of the debts of the complainants from the property the debtors had by separate mortgages conveyed to Lehman, and to Nathan Kahn, and by separate transfer to Hirschler. In bills of this kind by creditors, it is common practice, sanctioned for a long time by the courts, to join as defendants persons holding different portions of the debtor's property under separate and distinct conveyances. The object and purpose of the suit is single, the satisfaction of the demands of the creditors from the property of the debtor, and all that can be said is, that different persons have, or claim to have, separate interests in distinct or independent questions connected with, or springing out of that common purpose.—*Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Boyd v. Hoyt*, 5 Paige, 78; 1 Dan. Ch. Pr. 339, note 1. We are not of the opinion the Chancellor was in error in overruling the demurrers, or the motion to dismiss the bill for want of equity.

Whether there is error in the final decree rendered by the Chancellor granting relief to the complainants, depends wholly upon the evidence, whether the frauds averred were proved. The evidence, in some respects conflicting, as is to be expected in all cases of this character, it is apparent from the opinion of the Chancellor, was very carefully, thoughtfully, and deliberately examined, and considered. The conclusion reached by him must be here accepted as *prima facie* correct; and whoever assails it must be prepared to repel the presumption of correctness attaching to it alike as to matters of law, and of fact. We are not satisfied that his

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conclusions are erroneous, and unless we are satisfied of error, they must stand.—*Rather v. Young*, 56 Ala. 94.

The result is, the decree must be affirmed.

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### *Bill in Equity for Settlement of Guardian's Account.*

1. *What not a solvent condition of a banking institution; notice to directors; loan.*—An insurance company engaged in a general banking and insurance business, having a capital of \$100,000, of which \$70,000 is loaned out on mortgages of real estate of the same (but no greater) nominal value, cannot be considered in a healthy or prosperous condition; and its directors being chargeable with a knowledge of its condition, when they are sought to be charged with the loss of trust funds borrowed from a guardian, on whose bond they are sureties, cannot claim to have acted in ignorance.

2. *Character of guardian; abuse of trust.*—In the grant of letters of guardianship for an infant, the interest of the ward, the safety of his funds, and the character of the guardian for integrity and sound judgment, are the considerations that should influence the court; and it is an abuse of the trust to appoint a person of known insolvency, who is instigated to apply for letters by the officers of the insurance company, they becoming sureties on his bond, and he lending the infant's funds to the company without security.

3. *Same; settlement, expense.*—When a guardian resigns and makes a settlement of his accounts, the expense of the proceeding falls on the ward; and the statutes do not contemplate the appointment of a person who has agreed with one of his sureties, in advance of his appointment, to resign and settle his accounts at the expiration of one year, in order that the surety may be discharged; this is an abuse of trust.

4. *Same; re-appointment.*—When a guardian settles his accounts, and resigns, at the same time applying for a re-appointment as his own successor with different sureties on his bond, this should excite the vigilance of the court, and the appointment should be refused without a sufficient explanation of the unusual circumstances.

5. *Sureties; liability.*—The guardian having loaned the trust funds of his wards to an insurance company, whose directors had become sureties on his official bond, on his agreement to lend the funds to their company, no security being given or required for the loan, it is immaterial whether this was a stipulation of the original agreement; nor can the directors, in avoidance of their personal liability as sureties, shelter themselves behind a formal compliance with the requisitions of the statute (Code, § 2773), because two persons of known insolvency signed their names as sureties for the loan.

6. *Guardian and ward; sureties on bond.*—A guardian cannot, during the minority of his ward, file his accounts for final settlement, make a settlement with a guardian *ad litem*, and resign; such settlement being unauthorized, it neither discharges the sureties on his bond, nor binds the ward.

7. *Same.*—On such settlement and resignation, the guardian being immediately re-appointed, and giving bond with the same sureties (except one, who sought thereby to be discharged), the exhibition and tender to him of the money which he had loaned the insurance company, and which he had promised in advance not to accept, does not amount to a payment in fact, nor affect the rights and liabilities of the parties.

8. *Doctrine of retainer; bond, election, ward.*—In such a case the doctrine of retainer and presumed extinguishment, growing out of the dual relation of



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debtor and creditor existing in the same person does not apply; the sureties on the first bond are not discharged, but the ward may, at his election, proceed against the sureties on either bond.

9. *Sureties; bill, amendment.*—The bill being filed against the sureties on both bonds, and alleging that all participated in the proceedings connected with the resignation and re-appointment of the guardian, for the purpose of procuring the release and discharge of the single surety on the first bond who did not sign the second bond, and at the same time enabling the insurance company to retain the money, it was held on the former appeal (*Lee v. Lee*, 55 Ala. 590), that the bill was not multifurcous. But the evidence failing to sustain the allegations of the bill as to the participation of the released surety in the covinous combination and conspiracy established against the others, the complainants are entitled to no relief against him; but being entitled to substantial relief, they should be allowed an opportunity to amend their bill.

10. *Breach of official duty; trustees in invitum.*—When a guardian lends out the money of his ward without security, he is guilty of a breach of official duty, and the borrower, if cognizant of this breach of duty, becomes a trustee of the money in invitum; and the ward may, at his election, hold them accountable as joint and several trustees.

11. *Partial payment; collateral.*—In such a case a partial payment made by the borrower, operates as a partial payment made by the guardian; and a mortgage, or other collateral security, given by the borrower to the guardian and enforced by the ward, operates only as a partial payment, and does not amount to a ratification of the guardian's unlawful act.

### APPEAL from Perry Chancery Court.

Heard before Hon. ANTHONY DILLARD.

The bill in this case was filed on 22d December, 1875, by John Lee, Edgar Lee and Mary Lee, the latter two being infants and suing by their next friend, the said John Lee, against their guardian, John H. Lee, and the several sureties on his official bonds as such guardian, to-wit: F. A. Bates, W. B. Modawell, J. H. Speed, J. W. Crenshaw, A. B. Lane, W. M. Brooks, W. C. Wyatt, Harriet Johnston, W. R. Brown, A. M. Foulkes, Carlos Reese, J. B. Cocke, and Amzi Godden; and was brought for the purpose of compelling a settlement of the guardian's accounts, and the payment into court of the money found due the complainants on a statement of the guardianship accounts. The complainants, together with David Lee, an infant of tender years, who died on the 13th of November, 1872, were the only children and heirs at law of John Lee, late of Perry county, who there died intestate, during the year 1870, being possessed of a large estate, real and personal; and letters of administration on his estate were duly granted soon after his death, to Porter King. On the 27th February, 1872, letters of guardianship on the estate of said four children were granted by the Probate Court of Perry county to John H. Lee, one of the defendants; and he thereupon gave bond as such guardian, in the sum of one hundred thousand dollars, with the defendants, F. A. Bates, W. B. Modawell, J. W. Crenshaw, J. W. Speed, A. B. Lane, W. C. Wyatt, and W. M. Brooks, as his sureties. On the 5th March, 1872, he received from the admin-

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istrator of John Lee's estate, the sum of seven thousand and eight dollars in gold, and twenty-three thousand seven hundred and ninety-two dollars in currency, belonging to the estates of his said wards, and on the 25th January, 1873, he returned an inventory to the court, under oath, acknowledging his receipt of these moneys on that day. On the 28th of January, 1873, he filed with the court his accounts and vouchers for a final settlement of his guardianship, showing the following balances in his hands due his wards: To John Lee, eighteen hundred and forty-four 86-100 dollars in gold, and four thousand nine hundred and fifty-eight 09-100 dollars in currency; to David Lee, then deceased, eighteen hundred and forty-four 86-100 dollars in gold, and five thousand four hundred and nineteen 35-100 dollars in currency; to Mary Lee, the same amount in gold, and four thousand two hundred and eighty-seven 48-100 dollars in currency. The court thereupon appointed the 5th day of March, 1873, following as the time for the settlement; and ordered three weeks notice of it to be given. On the 5th of March, 1873, the court appointed T. A. Givhan as guardian *ad litem* of the infants, and he accepted the appointment in writing, certifying on the accounts, as filed, that he had examined them and found them correct, and consented that they be allowed as stated; and the court thereupon allowed the accounts as stated, and rendered decrees against the guardian, in favor of each of the complainants for the amounts thus shown to be due each of them respectively, including the amount found due the estate of David Lee. The decree further recites that the guardian has resigned, accepts his resignation, and orders that he be discharged from the further performance of his duties as such guardian. On the same day the said John H. Lee again applied for letters of guardianship on complainant's estates, and letters were again granted to him; and he thereupon gave another bond, which was accepted by the court in the sum of sixty thousand dollars, with F. A. Bates, W. C. Wyatt, W. R. Brown, A. B. Lane, W. M. Brooks, W. B. Modawell, J. H. Speed, A. M. Fowkes, Carlos Reese, J. B. Coke, Amzi Godden, and Mrs. Harriet Lee, (the mother of complainants, who afterwards married again, and was made party defendant to the bill by the name of Harriet Johnson), as his sureties. On the 9th day of April, 1873, the guardian filed in said court as an inventory of his ward's estates, a statement under oath that he had collected from the Perry Insurance and Trust Company the sum of seven thousand three hundred and seventy 44-100 dollars in gold, and the further sum of twenty thousand two hundred and seventeen 17-100 dollars in currency, being the aggregate amount

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of said decrees rendered against him on the 5th of March, as above stated, and had again loaned the same to said company for twelve months, at eight per cent. interest, with W. B. Modawell and W. R. Brown as sureties for the loan; and he asked that satisfaction of the decrees might be entered.

The bill alleges that John H. Lee was insolvent at the time of his first appointment as guardian, and so continued up to the time of the filing of the bill, and was known by his sureties to be insolvent when they signed his bond; that it was understood between him and them, at and before the execution of the bond, that he would lend the money belonging to his wards to the said Perry Insurance and Trust Company, of which said W. R. Brown was then the president, and F. A. Bates, J. W. Crenshaw and W. M. Brooks, directors; that on the 5th of March, 1872, pursuant to this agreement, he loaned all the moneys which he had received to said insurance company, without taking or requiring any security for the loan; that said company was at that time greatly embarrassed, and in doubtful circumstances, and its condition was well known to its directors; that on the 28th of January, 1873, the said company was in failing circumstances and unable to pay its debts, and had not repaid any of the money borrowed from said guardian; that said J. W. Crenshaw, knowing these facts, threatened to make application to the Probate Court to be released from liability on said guardian's bond; that thereupon it was planned between said Crenshaw, Brown, Bates, and other officers of said company, that he should settle his accounts, resign his guardianship, make application to be re-appointed, give a new bond, and acknowledge satisfaction of any decree that might be rendered against him; that this plan was contrived for the purpose of releasing said Crenshaw from liability on said guardian's bond, without the payment of any money, and without calling upon the said Insurance company for any money, and it was carried into effect and consummated as shown by the proceedings in the Probate Court; that said guardian made application for his re-appointment for the purpose of carrying out this agreement, and did not collect any money from said insurance company as he reported to the Probate Court he had done on the 9th of April, 1873; that W. B. Modawell and W. R. Brown, whom he had reported he had taken as sureties for the new loan, were at that time insolvent; that the said insurance company had become insolvent, had ceased to do business, and its assets had been placed in the hands of a receiver; that the guardian had thereby become unable to furnish the infant complainants with means of subsistence and education, and their property was in danger of



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being entirely lost; and they insisted that all the sureties on the two bonds were liable to them for the moneys which their guardian had received. The bill prayed that an account might be stated, to ascertain the amount due to the complainants respectively from the said guardian; that he and his sureties might be required to pay to the adult complainant, John Lee, the amount ascertained to be due him; that the amounts ascertained to be due to the infant complainants respectively might be paid over to a receiver, or some suitable person to be appointed by the court, and applied for their support and maintenance, and for other and further relief.

The defendants filed separate answers to this bill, admitting substantially the execution of the bond, and that at the time of its execution it was understood that the moneys belonging to the complainants should be loaned to the Perry Insurance and Trust Company. They alleged that Porter King, the administrator of the estate of the father of complainants, had kept the moneys belonging to said estate on deposit with the Perry Insurance and Trust Company, and that when a final settlement of Lee's estate was made, King had given John H. Lee, the guardian, an order on said company for the amount of the distributive shares of the complainants and their deceased brother, David Lee; that the amount of these shares was as the bill alleged; that by agreement between the guardian, Lee, and the Perry Insurance and Trust Company, the order of King, the administrator, was taken up by the said company, and the money retained by it as a loan; that Lee, the guardian, did not in fact take the money from the company and re-deliver it as a loan, but that it was left in the possession of the company; that owing to the entire confidence of the guardian and his sureties in the solvency of the company, the question of taking security for this loan was never thought of. The answers deny that at the time of such loan the Perry Insurance and Trust Company was largely in debt, and embarrassed with law-suits, or that all of its capital stock had been lent out to persons who were largely insolvent, or in doubtful and failing circumstances. The answers admit the final settlement of Lee, the guardian, and his resignation, but deny that at this time the Perry Insurance and Trust Company was in failing circumstances, but aver that it was perfectly solvent and enjoyed the trust and confidence of the community at large. The defendant, Crenshaw, denied that he ever threatened to apply to the Probate Court to be relieved from the guardian's bond, and while admitting that he wished to be discharged from said bond, this wish was in no

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manner attributable to any distrust of the solvency of said Perry Insurance and Trust Company. The answers all deny any such plan as that charged in the bill, concocted between Lee, the guardian, and any of the other defendants, that said Lee should settle his guardianship and apply to the court to be again appointed guardian of complainants, and give a new bond and acknowledge satisfaction of the balance found to be due on such settlement, for the purpose and with the intent of releasing Crenshaw from liability on said bond. The answers further show that after the re-appointment of Lee as guardian of complainants, he came to a settlement with the Perry Insurance and Trust Company in regard to the moneys of his ward, loaned to said company, and after ascertaining the balance due him as such guardian, he agreed that the company might retain the money as a loan for twelve months, and the company executed its promissory note therefor. That Lee, in the inventory he filed in court under oath, showed his disposition of such moneys; that upon the application of the guardian the Probate Court approved of his said report and ordered the same recorded; that John H. Lee did not seek a re-appointment as guardian of complainants by reason of any such scheme or plan as that set out in the bill, but was induced to do so by the entreaties of Mrs. Harriet Lee (now Johnston), the mother of complainants; that John H. Lee is not indebted to the complainants in the sums mentioned in the bill, or in any part thereof. It was further alleged that the father of complainants had great faith in the Perry Insurance and Trust Company; that he was a Director of the same, and was in the habit of lending his money to that institution; that his administrator, Porter King, fully concurred in these views, and deposited the moneys of Lee's estate with said company as long as he was such administrator, and also his own individual moneys. The defendant, Crenshaw, alleged in his answer, that while very loath to go on the guardianship bond of John Lee, it being contrary to his rule to do so, he nevertheless consented to become, and did become, one of the sureties on such bond, upon the representation of said guardian that he would lend the moneys of his wards, the complainants, to the Perry Insurance and Trust Company, in which respondent, Crenshaw, had great faith, as being sound financially. Crenshaw also alleges that if the money belonging to the complainants had been lost by their guardian by reason of his lending the same to said Insurance and Trust Company, it had been lost since the resignation of said guardian, after his re-appointment and after Crenshaw had been released from all liability on his said bond. The answers of the defendants further aver that

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the allegation in the bill that by reason of said moneys being lent to the Perry Insurance and Trust Company it was in great danger of being lost, was untrue, but that, on the contrary, every dollar of said moneys could be collected. All the respondents admit that it was one of the conditions of their becoming such guardian's sureties, that the moneys of the wards should be loaned to the Perry Insurance and Trust Company. John H. Lee, the guardian, also makes this admission. They all deny that they knew of John H. Lee's insolvency at the time they signed his bond as guardian, and John H. Lee denies that he then knew himself to be insolvent. Said Lee admits that he was largely indebted at that time, but avers that this indebtedness arose from the purchase of property to which he then believed he had obtained good titles. He admits, however, that owing to after discovered defects in his title to said property, and various security debts, he was at said time, and is now, insolvent. Lee and Crenshaw both allege that the agreement of the latter to go on Lee's bond was for one year only, and that it was for this reason, and this reason only, that the resignation and re-appointment was had. John H. Lee further alleges, that though having full trust and confidence in the solvency of the Perry Insurance and Trust Company, he did in 1875 inform that company that he must have some additional security for his wards' money, and accordingly said company transferred to him a deed of trust upon two plantations containing about twenty-seven hundred and eighty acres, more or less, of land situated in Perry county.

Mrs. Harriet Johnston filed her answer to the bill, admitting substantially the averments thereof, and also a cross-bill against John H. Lee, and the sureties on his guardianship bond, praying, in substance, the same relief as that asked for in original bill.

Demurrers were interposed to the bill, but as these were considered and disposed of by this court in the case of *Lee v. Lee*, 55 Ala. 590, it is unnecessary to state them here.

The testimony in the case shows that the guardian, John H. Lee, was insolvent; that the Perry Insurance and Trust Company held a mortgage upon his entire property; that the law day fixed in said mortgage had passed; that the stockholders and officers of said company proposed and suggested to said John H. Lee, that he should become the guardian of complainants; that they agreed and promised to make his bond as such guardian, provided he would allow the funds of his wards to remain in the hands of the said company; that said guardian consented to this condition, and that said bond was made for the purpose of enabling the Perry Insurance



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and Trust Company to retain and use the funds of the complainants. The testimony of John H. Lee, W. R. Brown, F. A. Bates and John W. Crenshaw, establish these facts. It is further shown by the evidence that the sureties of John H. Lee on his first bond were stockholders and officers in said company; that these sureties sought out John H. Lee, and proposed and suggested to him that he should become the guardian of the complainants; that they agreed and promised that they would make his bond for him upon condition that he would suffer the money of his wards to be retained by the Perry Insurance and Trust Company; that the bond was made upon this agreement and understanding; that the sureties on such bond were induced to procure John H. Lee to be appointed guardian, and to make his bond for him solely to promote the interest of the Perry Insurance and Trust Company, and especially to obtain the moneys of complainants by a loan—said moneys being then in the possession of said company as a special and temporary deposit; that said Lee did loan the funds of his wards as agreed upon, without good and sufficient security. W. R. Brown, the president of the company, in his answer to the direct interrogatory, testified as follows: "Perceiving the injury that might result to the company . . . I, for one, thought best to get some person to be appointed guardian of the children, and certain stockholders and directors of the company consented to furnish the requisite security for John H. Lee, if he would become the guardian and lend the money to the company for one year." It was further shown by the said Brown's testimony that the money was loaned under a previous agreement between John H. Lee and his sureties, that he would lend said money to said company. The whole testimony shows that this understanding was well known before the first bond was executed, and by the sureties signing the same. It clearly appears that the sureties on the first bond of the guardian, Lee, were all stockholders, and some of them, directors of said Insurance and Trust Company, had originated and carried into effect the appointment of John H. Lee as guardian of complainants. It also appears that no outside security was asked or offered, and that the securities of the guardian did not wish any indemnity from the said company. It was further shown by the evidence that the Perry Insurance Company, with a capital of only about one hundred thousand dollars, had at the time of Lee, the guardian's loan to it, loaned out about seventy thousand dollars on mortgages of real estate of no greater nominal value. It was also shown that John H. Lee, or some one for him, procured from the Probate Judge of Perry county, several

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days before Lee's final settlement, a blank bond in order that he might procure sureties to the same for his re-appointment. The final settlement, the resignation, and re-appointment of Lee, are shown to have been accomplished on the same day, and the second bond was also given on the same day. These and the other material facts are stated in the opinion. The court decreed that the complainants, and the cross-complainant, were entitled to the relief prayed for; that the final settlement, resignation, and re-appointment of John H. Lee, the guardian of complainants, was absolutely null and void for want of jurisdiction in the Probate Court acting upon the same; that there never had been any payment by the Perry Insurance and Trust Company, to John H. Lee, of the moneys belonging to complainants; that there was no security such as by law required, given by the Perry Insurance Company for the loan of such money; that such loan was a *devastavit* committed by the guardian, Lee, and that the sureties on his first bond were bound to make good to the complainants any loss resulting from such unauthorized loan by the guardian, Lee, to the Perry Insurance and Trust Company. It was further decreed that John H. Lee should settle his guardianship in the Chancery Court, and said Lee was decreed to file his accounts and vouchers for a final settlement before the register, who was directed, in stating such account, to act conformably to the terms of the decree as above set forth. The decree of the Chancellor upon the law and facts, are here assigned as error.

W. M. BROOKS, and JNO. F. VARY, for appellants.

JAMES W. LAPSLEY, and PETTUS, DAWSON & TILLMAN, for appellees.

STONE, J.—The capital stock of the Perry Insurance and Trust Company was one hundred thousand dollars, one-half of which, \$50,000, was paid in. For the remaining fifty per cent. the notes of the stockholders were taken. The business of the corporation was taking fire risks, and a general banking and exchange business. The company commenced business, and in about three years had substantially paid up the residue of the stock, \$50,000, in dividends declared. So that, in fact, only \$50,000 of the capital stock was paid in. In what we are stating, we are governed by what we understand to be the testimony of the officers in charge of the corporation. The principal business of the company was banking. We feel authorized to find from the testimony that by, or soon after the year 1869, three or four years after the com-

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pany had commenced business, the bank had out near or quite sixty thousand dollars of its money, in the hands of three or four persons. Twenty-five thousand dollars of this sum was out on a loan to John H. Lee, on mortgage of two plantations and their stock and equipments, which the witnesses testify were worth twenty-five thousand dollars. None of them place the value above that sum. Another loan of sixteen thousand dollars was secured by mortgage on a plantation, testified to be worth eight thousand dollars. A third loan or investment of a sum between sixteen and twenty thousand dollars, was also resting on the security of a plantation, not claimed to have been worth more than twenty-five thousand dollars. Now, it is common knowledge that lands put up at a forced, cash sale, rarely, if ever, bring their value. They do not generally sell for half their estimated value. That these lands were not convertible into money at the face value of the debts they were pledged to secure, is shown in the fact that in 1872, and even later, they had not been converted into money. Even when the company made an assignment and failed in 1875, one of these loans of twenty-five thousand dollars remained unsettled. A second claim of nearly or quite equal amount had not been realized upon in 1873, and the securities therefor were sold to Woodruff for about one-half they called for. The testimony does not inform us of the subsequent history or fate of the loan of sixteen thousand dollars. Add to these complications the fact that the company had a banking house worth ten thousand dollars, and we have a grand total of seventy per cent. of the capital stock invested in suspended, non-convertible securities and assets. However much the directory may have believed the corporation solvent and sound—and we cannot doubt they did—yet, viewed as a bank, we cannot think it was in a healthy and prosperous condition in March, 1872. And persons familiar with its condition and operations, as directors attending its meetings should have kept themselves, should have known that too much of its cash capital was invested in non-convertible securities. We are aware that men are ordinarily unduly hopeful. Bank directors are but men, and have common human infirmities. To this, in part, we ascribe the confidence the officers and directors had in their corporation in 1872, and in 1873. We do not think the bank was in a prosperous condition during either of those years. Mr. Crenshaw was one of the original stockholders, became a director in 1868, and continued such until the corporation failed in 1875. He is not shown to have been unfamiliar with the operations of the bank, and knowing the



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facts, he must, if necessary, be charged with knowledge that the banking operations had been imprudently conducted.

There are circumstances connected with Mr. Lee's appointment and continuance as guardian, which we feel it our duty to refer to. The infant children of John Lee, deceased, were about to have distributed to them thirty thousand dollars in money. John H. Lee, cousin of decedent, though shown to be an honest, upright man, was insolvent, and his insolvency was known to the directors and owners of the Perry Insurance and Trust Company. His chief indebtedness was to that corporation. It is not shown that he desired or asked to be appointed guardian, or that the oldest child, who must have been over fourteen years old, or the mother of the children, originated the thought of his becoming guardian. The thing was first suggested by persons in the interest of the Perry Insurance and Trust Company; and when Mr. Lee expressed an inability to make the bond, he was informed the company would make it for him. It is manifest from the whole proceedings that one of the conditions on which the company made the bond was, that he should lend the money to the company. If such had not been the understanding, he could not have made the bond he did; and we have no doubt if he had withdrawn the money from the bank, after either of his appointments, the sureties would at once have ceased to be longer bound for him, and he would have ceased to be guardian. Now, whether this loan was to be made with or without security, these were not proper considerations to enter into the selection or appointment of a guardian. A guardian for an infant should be selected for his good character, sound judgment, prudence, and adaptedness to the trust. He must safely keep the funds, and, at the same time, make them productive. The safety of the funds, and the interest of his ward, should be the sole guiding principle in the administration of his trust. In these functions he should be free and untrammelled. If he be under obligations, previously assumed, to make a particular disposition of the funds; in other words, if he be not entirely free to place the loan where it will be safest, most productive, and most readily reduced again to possession, then the personal disinterestedness of the trust is impaired, and his fiduciary relation is liable to become warped by his personal interest, or social obligation, if not by a more controlling exigency. However the pre-arrangement may have been regarded in the present case, the tendency of such bargains is antagonistic to the policy of our statutes, and must divide and weaken the severe loyalty the guardian owes his ward. He should always keep

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himself free to deal with a proposed borrower at arm's length.

Another subject for criticism. In the effort to relieve Mr. Crenshaw of all participation in the second appointment, the execution of the second bond, and the renewal of the loan to the Perry Insurance and Trust Company, it has been sedulously sought to show that one of the conditions on which he, Crenshaw, consented to become, and did become, a bondsman in the first appointment, was, that he, Crenshaw, should remain bound only one year, and at the end of that time, Lee should settle his guardianship, account for the funds, and then release Crenshaw. Now, the resignation of a guardian, the making of a final settlement, and taking out new letters, each entails expense, rendered necessary only by the resignation, and that expense falls on the estate of the ward. True, under a statute of 1871, a guardian may resign his trust.—Code of 1876, § 2768. It was never contemplated, however, by the legislature, that a guardian should be appointed with a foregone determination to resign at the end of a year, and during the minority of the ward.

We have commented on these peculiarities, if not irregularities, attending these guardianships, with no intention of making them the basis of our decree. Our purpose has been to call attention to them, to characterize them as abuses, and, if possible, of preventing this peculiarly delicate and responsible relation of guardian from being perverted to the purposes of merchandise. We trust no probate judge would make the appointment of a guardian, if he knew that one of the conditions on which he could make his bond was, that he should commit the custody and administration of the ward's estate to another, either natural or artificial, person; or, if he knew the trust was to be retained for only a short period, less than the term of the ward's minority. We take a step farther. If an administrator or guardian resign, and, at the same time, apply for re-appointment as his own successor, and offer a new bond with sureties changed, this should awaken inquiry in the breast of the probate judge; and, *prima facie*, he should refuse to make the second appointment. We do not design these remarks to apply specially to this case, more than to any other similarly circumstanced.

A great deal of testimony has been taken to prove that, when Lee was first appointed guardian, there was no prior agreement that the money of the wards should be lent to the Perry Insurance and Trust Company, *without security*. As matter of fact, we think there is a failure to prove such pre-arrangement. It is not denied, however, that it was previ-

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ously agreed that the money should be lent to the corporation; and we think we may safely affirm that without such agreement, Lee could not have procured the sureties he did, and could not have made an acceptable bond. There is, on the other hand, no testimony that, in the previous negotiations, any thing was said about securities, and it is very certain that when the loan came to be made, none were required. True, two names were indorsed on the written contract, but the proof is, that these indorsers signed their names without request from any one, and both were confessedly insolvent when they so indorsed. We can not regard these indorsements as a compliance with the statute, or as furnishing any security whatever.—Code of 1876, § 2773. The guardian did lend the money without security, and this rendered him and his sureties liable therefor, no matter how solvent the insurance and trust company may have been at that time. He violated a positive statutory duty, and this fastened the liability.—*Lee v. Lee*, 55 Ala. 590, 598.

Having shown that the guardian, by lending the money without security, fastened a liability on himself and sureties, the question is, have the sureties on the first bond who were not on the second, been discharged? The loan was made March 5th, 1872, and the liability then attached. Has it been cancelled?

In January, 1873, Lee, the guardian, filed his account current and vouchers for a final settlement of his guardianship, pursuant to the agreement he made with Crenshaw. Proper order was made, notice by advertisement given, and on the 5th day of March the accounts were audited, the balances ascertained, and decrees were rendered against him for the several sums ascertained to be due his wards respectively. No objection is urged to the formal regularity of these proceedings. In point of fact, Lee was guardian when he filed his account current, and continued so until the day of settlement, March 5th, 1873, when he resigned. He took all the steps necessary to a settlement, if he did not make the settlement itself, before he resigned. The record does not inform us whether the settlement or resignation was first in point of time; but does inform us that both took place March 5th, 1873. A guardian *ad litem* had been appointed to represent the minors in the settlement, and the decrees were rendered in his favor for the use of the several minors. There is no statute authorizing a guardian to settle his accounts finally, while he remains in office. He can settle when the ward comes of age, or, if a female, when she marries, or when his authority as guardian ceases by removal, &c.—Code of 1876, § 2772. There are other provisions for coercive settle-



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ments, but they do not apply to this case.—Code, §§ 2791-2. The settlement being set on foot and made when the Probate Court had no authority or jurisdiction in the premises, it stands for nothing, and may be collaterally assailed, or treated as a nullity.—*Lewis v. Allred*, 57 Ala. 628. Until the term of the guardianship had ceased by the majority of the ward, or, by a cessation of the guardian's authority, the Probate Court had no jurisdiction to take any steps looking to a final settlement. This case must be treated, then, as if no attempt had been made to settle in March, 1873.

It is contended for Crenshaw, that he is entirely discharged from liability: *First*. Because, after Lee had resigned his first guardianship, had been re-appointed, and had qualified under that appointment, the Perry Insurance and Trust Company actually paid to him the money it had borrowed from him, that he then re-lent the money to the company, and reported to the Probate Court that he had collected the several decrees rendered against him in the former guardianship. We can not agree to the proposition that what took place on the 5th March, 1873, amounted to a payment in fact. True, the money was shown to Mr. Lee, and we have no doubt it was the correct amount. He was also informed that there was his money, and he was requested to count it. This, however, was but an empty form. He had previously agreed not to take the money from the company, and on the strength of that agreement, the officers and stockholders of the coporation had made his second bond for him. If he had taken the money, he would have violated his agreement, and we have no doubt his sureties would have refused to be longer bound for him. The law regards the substance of things, not their semblance. There was no payment in fact.

It is contended, in the second place, that inasmuch as Mr. Lee, by his second appointment, became his own successor—thus centering in himself the authority to demand, and the duty to pay—the law, from the necessity of the case, presumes a payment of the claim to the creditor estate. This, because the law furnishes him no coercive measures for collecting the demand, and because it was his duty under the second appointment, to possess himself of the assets of his ward. We need not, and do not, in this case, decide what would be the rule, if Lee had made a valid settlement of the guardianship, and the decree of the court thereon, had fixed and determined authoritatively, the extent of liability of the first to the second guardianship. That is not this case. We have shown above that the attempt to make a settlement was a nullity, because the statutory jurisdiction did not attach. The case then stands in law, as if the amount due from the

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first to the second guardianship was unascertained. In such cases, we hold that the wards are clothed with an election, to charge the sureties on the first bond, for the unauthorized loan of the money by the guardian, without security; or, they may proceed against the sureties on the second bond, for the failure of their principal to obtain a proper decree of the court, and transfer the assets to the second guardianship. The case is directly within the principle declared in *Whitworth v. Oliver*, 39 Ala. 283. See *Morrow v. Peyton*, 8 Leigh. 54; *Aylett v. King*, 11 Leigh. 486; *Flinn v. Carter*, 59 Ala. 364.

There was a demurrer in the court below for multifariousness. The multifariousness charged was, that the bill makes both sets of the sureties defendants, and seeks a joint recovery against them for the funds improperly lent to the insurance and banking company, under the circumstances disclosed above. The Chancellor sustained the demurrer for multifariousness, and the complainants appealed to this court.—*Lee v. Lee*, 55 Ala. 590. We reversed the ruling of the Chancellor, holding that on the face of the bill it was not multifarious. Among the averments of the bill, which we decided was not multifarious on its face, we copy as follows: "That before and on the 28th day of January, 1873, [the time when the accounts current were filed to make final settlement of the first guardianship], the Perry Insurance and Trust Company was in failing circumstances, and unable to pay its debts, which was then well known to said J. W. Crenshaw," and the other sureties on Lee's first guardian bond; "that said J. W. Crenshaw, well knowing the failing condition of said Perry Insurance and Trust Company, and that it was unable to pay its debts, and well knowing that said company was indebted to John H. Lee as guardian, as aforesaid, on account of the money so loaned, in a sum of more than twenty-seven thousand dollars, and well knowing that said John H. Lee was insolvent, threatened to make application to the Probate Court to be released from the bond of said John H. Lee as guardian, as aforesaid: thereupon, it was planned between said J. W. Crenshaw and said W. R. Brown, then president of said Perry Insurance and Trust Company, said Francis A. Bates, and the other officers of said company, and said John H. Lee, that said John H. Lee should settle his said guardianship in the Probate Court, and resign his said guardianship, and then apply to be re-appointed guardian of your orators and oratrix, and give a new bond, and acknowledge satisfaction of the balances which should be found against him on such settlement; that this arrangement was contrived and planned, for the purpose and with the intent

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to release the said J. W. Crenshaw from liability on the said guardian bond, as the surety of said John H. Lee, without the payment of any money." The bill then avers that all these plans were carried out with the concurrence of said J. W. Crenshaw, W. R. Brown, and F. A. Bates, and other officers of said company, and that it was done "for the purpose and with the intent on the part of said John H. Lee, J. W. Crenshaw, W. R. Brown, and other officers of said company, to carry out the plan so contrived to release said J. W. Crenshaw from his said liability, without the payment of any money; and then prevent any call being made on the Perry Insurance and Trust Company for the payment of the money so borrowed from John H. Lee, as aforesaid." Treating these averments as true, as it was our duty to do on demurrer, they make a very clear and strong case of covinous combination and conspiracy to defraud the complainants. The only name found on the first bond that is not on the second, is that of J. W. Crenshaw. Hence, he alone is interested in having the first set of sureties discharged. It will be seen in the averments copied, that he is charged with full knowledge, and with active participation in all that was unlawfully planned and executed to the prejudice of complainants. The charges made, if true, fix on him a liability, common with the other bondsmen. On these grounds, and these alone, was the bill in this cause relieved of the charge of multifariousness.—*Lee v. Lee*, 55 Ala. 590. The case is now before us on the testimony. We have shown above that in March, 1872, and in March, 1873, the Perry Insurance and Trust Company, as a banking institution, was not in a prosperous condition. It is not shown it was insolvent, or that Crenshaw knew or believed it was in failing circumstances. On the contrary, the testimony shows that he, the other directors, and the stockholders, believed the corporation to be solvent and sound at each of those dates. There is not only no testimony connecting Crenshaw with the design, plan and combination charged, to have Lee re-appointed, to have him execute a new bond, and thus release Crenshaw, without requiring the company to pay the money, but the testimony is uniform, strong, and convincing, that he, Crenshaw, had nothing to do with procuring the second appointment, the execution of the second bond, or the continuance of the loan to the company. The testimony is, that he did not even know there was a plan or wish to have Lee re-appointed. He desired to be released from the bond, expected Lee's guardianship to cease, and expected the money to be paid. The testimony is, that the company had set apart the money with which to make the payment, and, at one time, expected



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to pay it. There was a purpose subsequently formed to have Lee re-appointed, and thus retain the money in the bank, but there was no proof connecting Crenshaw with this newly formed purpose, or showing he had knowledge of it. The combination and conspiracy charged upon Crenshaw, with others, which, on demurrer, relieved the bill of the imputation of multifariousness, is thus shown to have failed in the proof. In the only aspect in which the unities of the bill can be maintained, the complainants must fail for want of proof. The testimony fails to show a common liability resting on Crenshaw and the new sureties on the second bond. We have shown above that each set of sureties is liable, but there is no common liability. It presents a case for election by the wards, against which set of sureties they will proceed. This objection arises on the evidence, which fails to sustain one phase of the bill, still it shows complainants are entitled to substantial relief, and they are entitled to an opportunity to amend.—Code of 1876, § 3790; *Smith v. Coleman*, 59 Ala. 260.

The bill in the present case was filed December 22d, 1875. In 1876 John H. Lee, by mortgage, conveyed to the Perry Insurance and Trust Company, two plantations, to secure the payment of a debt he owed the company for money advanced for him, amounting to twenty-five thousand dollars. This debt remained uncollected, and in March, 1875, when the affairs of the corporation were becoming desperate, this mortgage and the debt it secured were transferred and assigned by the company to John H. Lee, guardian, as collateral security of the said loan, so made by Lee, guardian, to the company. It was stipulated in the assignment that the mortgage should not be purchased until after three years from the assignment. In July, 1878, the present complainants, wards of said John H. Lee, filed their bill to foreclose this mortgage, claiming the proceeds to be realized, in part payment of the said sum due them from their guardian. The defendants in this suit plead this, and rely on it as a ratification of the illegal and unauthorized loan made by the guardian, and as a bar to any further complaint by the wards that their moneys had been lent without security. When Lee, the guardian, lent the money of his wards to the Perry Insurance and Trust Company without security, he committed a *devastavit*—a breach of his statutory, official duty. *May v. Duke*, 61 Ala. 53. The Perry Insurance and Trust Company, when they then borrowed the money, knew it was the property of his wards, and must be charged with knowledge that in the loan the guardian violated his statutory duty. The company aided him in this breach of duty, and

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became recipients of the money by and through that breach of duty. This constituted them trustees of the funds *in invitum*, with all the duties and disabilities of the rightful trustee and guardian, Lee, resting upon them, but, without the powers and rights of the latter. Thus making themselves trustees *in invitum*, it is in the power of the beneficiaries to charge this trust upon the company, and make it an original debtor to them, in common with their lawful guardian and rightful trustee. The company and Lee are joint and several trustees of this fund, and liable to account as such to the beneficiaries, if the latter elect to so treat them.—2 Story Eq. Ju. § 1257; Perry on Trusts, §§ 832, 835, 836, 840, 841, 810, 814; *Preston v. McMillan*, 58 Ala. 84; *Graft v. Carthman*, 16 Amer. Dec. 741; *Coleman v. Cocke*, 18 Ala. 757; *Powell v. Jones*, 1 Ired Eq. 337.

It being thus shown that the Perry Insurance and Trust Company had made complainants claim its original debt, in common with Lee, the guardian, it follows that any partial payment made, or security given by it, is no more a bar to further suit against it, or against Lee and his sureties, than if Lee himself had made partial payment, or given collateral security.

But aside from the principle stated above, we do not think there is anything in the alleged ratification that can prejudice the present complainants. Suing as they do, they are no more estopped than they would be, if Lee, their guardian, having collected a part of the money from the company, the wards accepted it from him, with a knowledge of the source from which it came; or, than Lee himself would be, if suing the insurance and banking company for the money. The suit to foreclose the mortgage does not exonerate Lee from liability for his *devastavit* and default, and his sureties are as much bound therefor as he himself is.—2 Story Eq. Ju. § 1092; *Harris v. Harrison*, 78 N. C. 202; *Powell v. Jones*, *supra*; *Alexander v. Doby*, Rice Eq. (S. C.) 23.

The Chancellor granted relief on the cross bill. The view we take of the case would seem to leave no ground for that bill to rest on. We will simply reverse his decree on the cross-bill, and leave it for disposition in the court below, after the pleadings shall have been amended.

The decree of the Chancellor is reversed, and the cause remanded.

[NOTE BY THE REPORTER.—At a subsequent day of the term the appellants applied for a re-hearing, upon which the court rendered the following opinion.]

[Lee v. Lee.]

STONE, J.—It has been again pressed upon us with great zeal and earnestness, that the wards, complainants in this suit, by claiming the benefit and security of the mortgage of Lee, their guardian, to the Insurance and Trust Company, which was subsequently transferred by the latter back to Lee as security, of the loan to the company, must be regarded as having thereby ratified and adopted as legal, the loan made to the company. In other words, the principle is invoked, that if A, without authority, convert the money or property of B, into other property, and B, with knowledge, assert his ownership of the property into which his own effects had been converted, this is a ratification of A's unauthorized act, and equally absolves A from liability for the conversion, and the person to whom he had delivered B's effects from liability to account therefor. The principle is, that ratification, with full knowledge, is the equivalent of prior authority. In holding, as we did in the principal opinion, that the Insurance and Trust Company had made itself a trustee *in invitum*, and thereby became a principal debtor, we thought, and still think we showed the inquiry propounded above was, and is immaterial. Being a principal debtor, partial payment or partial security absolves no one, except *pro tanto*, any more than partial payment or security given by a joint obligor, will absolve his co-obligor.

But that principle has no application to this case. This is not the case of a conversion of trust funds by the trustee into something else, leaving the beneficiary the right and privilege of claiming the thing converted, or the thing into which it is converted.

The law, in such case, justly says he may claim either, but shall not have both. In the present case the breach of trust was committed in March, 1872, by lending the money to the insurance company without security. The money was not converted into anything, which the beneficiaries did or could claim. Three years afterwards, the Insurance and Trust Company turned the mortgage security over to Lee the guardian, as collateral security to the debt the corporation owed to him as guardian. In equity, every one interested in the collection of the debt the insurance company owed, had the right to claim that the proceeds of that collateral security should be applied towards the liquidation of the original liability. The beneficiaries—wards—the sureties of Lee, the guardian, and the Perry Insurance and Trust Company, each and all had the right to have the collateral made available for their common benefit. See *Thames v. Herbert*, 61 Ala. 340.

Nor is there anything in the argument, that by asserting claim to the collateral security, the complainants (wards) weak-



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ened or impaired any right Crenshaw, as surety of Lee, could assert. His right, as surety was, to stand on the terms of the contract his principal, John H. Lee, had, by his bond, made with the complainants. It was his equitable right to have every security Lee, his principal, had acquired, utilized in his own exoneration. The complainants, the wards, had the same right, and their suit to foreclose was but an assertion of that right. If they, by their own act, or, possibly by their negligence, had deprived Crenshaw of the benefit of that fund, a contention by him that they had thereby discharged him, would be much better supported by reason and authority than the position he now takes. If he suffered the Lees, complainants, to acquire the mortgage property at a sum below its value, that was his own error or fault.

The application for a re-hearing must be denied.

## Alabama Gold Life Insurance Company v. Anderson.

*Bill in Equity to Creditor to be Subrogated to the Rights of Surety Holding Mortgage from Principal Debtor.*

1. *Security created by surety; when enures to creditor.*—A security or trust created by the principal debtor for the benefit of his surety, and not limited in terms to the mere personal protection of the latter, is a security or trust for the payment of the debt, and enures to the benefit of the common creditor.

2. *Same; same.*—But, to have this effect, the trust or security must confer on the surety a clear right to appropriate it to the payment of the common debt, and the right to retain it until the debt be paid.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

On January 7, 1875, F. L. McCain recovered a judgment in the Circuit Court of the United States, at Mobile, against the Southern Life Insurance Co. of Memphis, for the sum of \$6,535.56, which judgment shortly thereafter became the property of the Alabama Gold Life Insurance Company. The Southern Life Insurance Company desiring to appeal to the Supreme Court of the United States, applied to T. H. Daughdrill to sign the appeal bond for it. Daughdrill agreed to sign the appeal bond, and did so, making the following agreement, viz: "The said Daughdrill, on his part, agrees to become surety for the said Southern Life Insurance Company in such amount as it may be required or expected to give, to

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remove, by writ of error, to the Supreme Court of the United States a certain judgment for the sum of six thousand five hundred and thirty-five 56-100 dollars, recently recovered (besides costs) in the Circuit Court of the United States for the fifth judicial circuit, and southern district of Alabama, in favor of Francis L. McCain, against the said Southern Life Insurance Company, and also to take out a policy of insurance on his own life, or on the life of his wife, if he be un-insurable, in the office of the said Southern Life Insurance Company, and also to furnish within two months from this date to the said Southern Life Insurance Company the application of responsible persons for insurance on the lives of healthy persons to the extent of ten thousand dollars, if practicable; and further, the said Daughdrill agrees to use his influence in promoting the business of the said Southern Life Insurance Company; and the said Southern Life Insurance Company, on its part, agrees to loan to the said Daughdrill, within forty days from this date, the sum of five thousand dollars for the period of one year, at eight per cent. interest per annum, provided the payment of the same is secured by satisfactory mortgage on real estate in the city of Mobile, which is worth twice the amount of the loan, the title to which is satisfactory to the said Southern Life Insurance Company, its officers or agents, entirely free from all other incumbrances. It is further agreed, that in case the said suit should not be decided by the said Supreme Court before the expiration of the year for which said loan is made, then the said Southern Life Insurance Company will continue the said loan upon the same security until said suit is decided by said Supreme Court, and at the same rate of interest.

It is understood and agreed that the interest on said loan is to be paid in advance, annually or semi-annually, as said company may prefer; and it is also agreed the policy of insurance hereinbefore referred to, to be taken out by the said Daughdrill on the life of himself, or of his wife, is to be held by said Southern Life Insurance Company, or for its benefit, as an additional security (besides the mortgage) for the repayment of the proposed loan, until the final payment of such loan. The said Daughdrill further agrees to pay all taxes of whatever description, already due or that may become due, on the property to be mortgaged as above provided, and to pay all premiums that may become due on the policy of insurance to be issued on his own life, or the life of his wife, as above agreed, during the continuance of the loan above agreed upon. In case of failure to pay said taxes or said premiums, the aforesaid Southern Life Insurance Company be authorized to foreclose the mortgage on the said property."

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Daughdrill obtained the money mentioned in the agreement, and the mortgage therefor was executed and delivered by him on February 25th, 1875. On February 11th, 1875, a policy on the life of Mrs. Daughdrill was taken out in the Southern Life Insurance Company, by Daughdrill. The judgment was affirmed in the Supreme Court of the United States, and an execution issued thereon, was returned "no property found," as to all the obligors on the bond. Pending the appeal, on January 31, 1876, the Southern Life Insurance Company was adjudicated a bankrupt. In August, 1878, Daughdrill was adjudicated a voluntary bankrupt. Daughdrill being indebted to James Bond, as administrator of Poe, deceased, and to Anderson & Bond, made a deed to W. S. Anderson, as trustee, to secure the payment of these debts on the main body of lands described in the mortgage deed from Daughdrill to the Southern Life Insurance Company. The Southern Life Insurance Company filed its bill alleging the facts above recited, and shortly after its bankruptcy the assignees, under a decree of the District Court of the United States, at Memphis, Tennessee, sold the note and mortgage to the Alabama Gold Life Insurance Company, and the title was made it through the president of the Southern Life Insurance Company. The bill was then amended by setting forth the facts of the sale and purchase, and making the agreement, the mortgage and the mortgage notes, exhibits to the bill, and prayed a foreclosure and sale to satisfy the said notes. Mrs. Daughdrill, on whose life the company had issued a policy for \$5,000, died in January, 1876. The Chancellor decreed that the debts secured by the deed to Anderson, trustee for Bond, as administrator, and to Anderson & Bond, were superior in equity to the judgment, and decreed that the complainant was entitled only to the excess of the mortgage debt over the death claim, which operated as a payment of the mortgage to that amount. This ruling is assigned as error.

OVERALL & BESTOR, for appellant.—When Daughdrill signed the bond he became a surety for the principal debtor, the Southern Life Insurance Company, and we invoke the principle that securities received by the surety from the principal debtor, either for the payment of the common debt, or for the indemnity of the surety against loss because of his liability, are regarded as created for the protection of the debt, and equity will compel the execution of the trust. Daughdrill stipulated for at least partial indemnity. He received the company's money in connection with his becoming surety. Under the agreement he could keep the money



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as long as his liability on the bond existed, if he did not violate any other stipulation in the agreement. The general rule is, that where a surety or person standing in the situation of a surety for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground, that as the security is a trust for the better securing the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him.—Brandt on Guaranty & Suretyship, 380, § 282 ; 8 Ala. 866.

BRICKELL, C. J.—The general principle on which appellant relies in support of the remedy it seeks to enforce, is well known and familiar to courts of equity, and has been in this court allowed its largest operation. The principle is, that if a principal debtor creates a security, or trust, for the indemnity of his surety, not in terms limited to the mere personal protection of the surety, it is a security or trust for the payment of the debt enuring to the benefit of the common creditor. To bring a case within the operation of the principle, there must, of course, be a trust, or security created, conferring on the surety the clear right to appropriate it to the payment of the common debt, and the right to retain it until the debt is paid. The agreement between Daughdrill, the surety, and the Southern Life Insurance Company, the principal debtor, cannot be construed as creating a trust or security for the payment of the common debt, or for the mere personal protection of Daughdrill as surety. Reading that agreement by its terms alone, or in the light of the attending circumstances, by the loan of money to Daughdrill, and the contemporaneous mortgage to secure its payment, no other than the simple relation of debtor and creditor was created, or contemplated. True, in the agreement it is recited, as one of the inducements to the company to make the loan, that Daughdrill had agreed to become surety on the writ of error bond. This is, however, in connection with the recital of other inducements—the taking from the company a policy of insurance on his own life, or that of his wife ; the procuring, within two months, insurance on the lives of healthy persons, to the extent of ten thousand dollars, if practicable, and the use of his influence in promoting the business of the company. The writ of error bond, and the agreement, were executed cote-

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poraneously. The loan was made subsequently, after Daughdrill's liability as surety had been incurred. Now, if Daughdrill had declined taking the policy of insurance on his own life, or that of his wife; or had declined to furnish the insurance promised on the lives of healthy persons, it being practicable; or had declined to exercise his influence in promoting the business of the company, without any want of good faith, without a violation of confidence reposed, the company could have declined making the promised loan. Or, if the titles to the real estate, which was to be mortgaged as security for the loan, were not satisfactory, or the real estate was not worth twice the amount of the loan, the company, keeping within the agreement, could have refused to make the loan, though Daughdrill's liability as its surety was existing, and from it he was without remedy to demand relief. The company, doubtless, was influenced in making the loan, by the fact that Daughdrill had become its surety on the writ of error bond. It may have been more inclined for that reason to accommodate him with a loan, than it would have been if that relation had not existed. The mere inducements to parties to contract, cannot vary the relations the contract creates, nor can they stamp upon the contract a nature and character inconsistent with its terms, and the obligations arising from them.

The company was very carefully keeping in view their relation and rights as creditors, and stipulating for security in that relation. It was not indemnity to Daughdrill for the liability he had incurred as surety, or security for the debt if the judgment was affirmed, or the creation of a fund for its payment, which was contemplated, or which was deemed necessary. There is a stipulation for the continuance of the loan beyond the period of one year, until the decision of the cause in which the writ of error had been taken, but that is dependent on conditions. The continuance was not a matter of right in Daughdrill, unless he kept down the interest, paid the premiums on the policy of insurance he had promised to take, and kept down the taxes on the mortgaged property.

The test whether a trust or security was created for the payment of the debt, is, whether Daughdrill could have claimed to retain the loan merely because of his liability as surety. Before paying the common debt, he had no remedy against the principal, and no right to withhold payment of the debt due from him.—*Strandifer v. White*, 9 Ala. 527. The agreement would not have furnished cause for resisting the exercise of the power of sale contained in the mortgage, nor would it have afforded defense to a bill for foreclosure. The

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common debt being unpaid, was not of present inquiry, but of prospective and contingent inquiry only; and this could not have afforded him an equity to retain his own debt, until it was removed. There is no feature of the case, as it is presented—no view of the rights and remedies of Daughdrill, which would authorize the conversion of the relation of the parties from that which the agreement so clearly imports, of debtor and creditor, into that of trustee and *cestui que trust*, and that is the relation which must exist, or the claim of the appellant cannot be supported. It was not that relation, with its rights and duties, the parties contemplated: Daughdrill was the debtor of the Southern Life Insurance Company, for money loaned. The company became his debtor, when, by the death of his wife, the insurance policy became payable. By the terms of the policy, the debt to Daughdrill was to be applied to the payment of his debt to the company. Whether the application was made or not is immaterial; for, in a court of equity, it will be regarded as made—that being considered as done, which ought to have been done. We find no error in the record, and the decree is affirmed.

## The City of Selma *et al.* v. The Selma Press and Warehouse Co.

*Bill in Equity to Enjoin the Collection of Municipal Tax and Vacate Levy and Assesment.*

1. *Municipal corporation; when cannot levy taxes.*—A municipality which has power “to levy taxes on real and personal property auction sales, and sales of merchandise, and capital employed in business therein, and street tax on all male inhabitants of the age of twenty-one years,” is prohibited both by the absence of legislative authority, and by the enumeration of certain powers, of which this is not one, from levying a tax on the gross receipts of warehouses.

APPEAL from the City Court of Selma.

Tried before W. C. WARD, Esq., as special Chancellor.

This was a bill in equity, filed on January 22d, 1878, by the Selma Press and Warehouse Company, against the City of Selma and A. J. Goodwin, its tax collector, and sought to restrain the collection of a tax on the gross receipts of its business as a warehouse company, and to vacate and annul a levy which had been made on property belonging to it. The bill alleged that the complainant, a corporation located



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in the city of Selma, was engaged in the business of storing cotton and other merchandise, and in compressing cotton for shipment; that by an ordinance of July 10, 1875, the city of Selma attempted to levy a tax on the gross receipts of all warehouses; that complainant listed all of its property for taxation except its gross receipts, which, by advice of counsel, it refused to do; that the city tax assessor for several years assessed this tax against the complainant, which it refused to pay, although it has paid all other taxes assessed against it by the city; that the tax will be again assessed against it, and that the real estate of the complainant had been levied on, and was about to be sold to pay this tax; that this tax is not authorized by the charter of the city of Selma. It was agreed that the cause should be tried on the averments of the bill, which were admitted to be true, the respondents denying that the city had no authority to impose the tax. The grant of power to the city to levy taxes is given in the opinion of the court. The special Chancellor rendered an opinion deciding that the city had no power to impose the tax, and his decree vacating the assessment and levy of the tax, and perpetually enjoining its collection, is assigned as error.

THOMAS W. CLARK, for appellant.—The power of taxation is conferred on the city in the most general terms.

“The mayor and council shall have power to levy taxes on real and personal property, auction sales, and capital employed in business within said city, and sales of merchandise.”—Acts of Ala. 1874-5, p. 38. Auction sales are mentioned because the auctioneer rarely, if ever, pretends to own the property he sells, and to attempt to collect from the individual owners would be impossible and cause an immense amount of trouble. Merchandise sales are also mentioned, because the merchant turns his capital over several times a year. Under the head of personal property, when the merchant came to list he would put down merchandise so much, meaning not more than the stock actually on hand, “capital employed in business.” It is very frequently men are operating on borrowed capital, or persons have their residences at some other place, but have capital invested in business in the city.—U. S. Digest, Vol. X, Per. Prop. 2. And for these reasons, this enumeration was incorporated in the charter, and not from any intention to exclude all other subjects of taxation.

BROOKS & ROY, for appellee.

STONE, J.—The assignments of error, and the arguments

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of counsel, raise but a single question : whether the city charter authorizes the levy of the tax the city attempted to impose? In *Baldwin v. City Council*, 53 Ala. 457, this court held that "the Legislature may confer on the municipalities it creates, such measure of power to levy and collect taxes as it may deem expedient, not greater or other than it possesses." It was added, "that this power is capable only of clear and unequivocal delegation. When express power to levy and collect particular taxes is conferred, the power to levy and collect other taxes is excluded. Or, if particular subjects of taxation are enumerated, the corporation has not capacity to enlarge them."—See, also, 2 Dil. on Mun. Corp. 3d ed. §§ 784 (623), 785 (624).

The city government of Selma has power "to levy taxes on real and personal property, auction sales and sales of merchandise, and capital employed in business in said city, and street tax on all male inhabitants of the city, of the age of twenty-one years and upwards." The tax complained of in this case was levied on the gross receipts of warehouses. This is not within any of the enumerated powers in the city charter, and its exercise is alike interdicted by the absence of legislative authority, and by the enumeration of certain powers, of which this is not one. The opinion of the special Chancellor is an able and well considered argument, fully sustained by his citations. We could not strengthen it by any thing we might add.

Affirmed.

## Allen, Adm'r, v. Elliott et al., Adm'rs.

*Action on Promissory Note ; Plea, Statute of Limitations and of Non-claim.*

1. *Non-claim, statute of ; mere knowledge of claim does not prevent operation of.* There must be an actual presentation of the claim, or some act of the creditor which is equivalent thereto, to prevent the operation of the statute of non-claim ; mere knowledge of the existence of the claim on the part of the executor, or administrator, no matter how full, will not have that effect.

2. *Same ; by whom claim must be presented to avoid operation of.*—The claim must be presented by some one having an interest in it, and a legal right to enforce its payment, which must be evinced by some word or act which indicates an intention to look to the estate of the deceased debtor for its payment.

3. *Presentation ; evidence as to which one of two estules the claim is presented against admissible.*—Where both the makers of the note were dead, and the same person was the administrator of the estates of each of them, he should be permitted to testify in a suit against him as administrator of one of the

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estates that no presentation was made to him of the claim as against that estate, and the endorsements of presentation on the note are relevant evidence on that issue.

4. *Statute of limitations; how time between death and grant of letters computed in calculating bar of.*—In calculating time between the death of a person and the grant of letters on his estate, the day of his death must be included, and the day on which the letters are granted must be excluded in computing the time necessary to bar an action against the administrator.

5. *Statute of limitations; note barred by in this case.*—Where a note was made April 18, 1861, the statute of limitations beginning to run on September 21, 1865, and continuing to run until the death of the maker, which occurred February 24, 1866, whereupon it was suspended until April 30th, 1866, when letters of administration were granted, and for six months thereafter, and action was brought on the note against the administrator of the estate of the maker on May 27, 1872, such action was barred by the statute of limitations of six years, by one day.

6. *Sunday; when statutes of limitations expires on that day, action to be brought on Saturday preceding.*—When an action would be barred by the statute of limitations on Sunday, that day must be excluded from the count, and the action brought on the Saturday preceding, to save the bar.

### APPEAL from Shelby Circuit Court.

Heard before Hon. J. E. COBB.

This was an action brought on the 27th of May, 1872, by J. L. Elliott and G. W. Bilberry, as administrators of the estate of Bennett Davis, deceased, against B. P. Allen, as administrator of the estate of R. J. Allen, deceased. The suit was founded on the following note, viz: "April 18, 1861. \$900. One day after date we promise to pay to the order of Bennett Davis, nine hundred dollars, for value received. R. N. Allen, R. J. Allen." The defendants pleaded, "in short by consent"—1. The general issue; 2, the statute of limitations of six years; 3, the statute of non-claim. On the trial the plaintiffs read this note in evidence, and offered in evidence the following written statement, found on the back of the note, viz: "Presented this 24th December, 1861. R. J. Allen, Adm'r of the estate of R. N. Allen. Presented June 22, 1867. B. P. Allen, Adm'r *de bonis non* of the estate of R. N. Allen, deceased." The defendant objected to the last indorsement, because it did not show any act or declaration of defendant tending to show that the note had been presented to him as administrator of the estate of R. J. Allen, deceased; but the court overruled the objection, and allowed the evidence to go to the jury, and the defendant excepted. The plaintiffs proved that R. J. Allen, defendant's intestate, died on February 24, 1866, and that letters of administration on his estate were granted to the defendant on April 30, 1866, and that the 26th day of May, 1872, was Sunday. The defendant testified that the note sued on was presented to him by a son of Bennett Davis. He was then asked if, at the time the note was presented to him, Davis did not say that it was presented against R. N. Allen's estate, and not against



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the estate of R. J. Allen. The plaintiffs objected to this question, and the court having sustained the objection, and refused to allow the witness to make the statement, the defendant duly excepted. The court charged the jury as follows: "The only question for you to consider is, whether or not this action is barred by the statute of limitations of six years. If six years elapsed after making certain exclusions of time, to which your attention will be called, between the day when the statute began to run and the day on which the suit was brought, the action is barred. The statute ran from the 21st day of September, 1865, down to the day when suit was brought, subject to certain exclusions of time that will be mentioned. In estimating whether or not the said six years had elapsed, *you must count from the 21st day of September, 1865, to the 27th day of May, 1872, the day suit was brought; and in making this count, you must exclude the first day and include the last, or include the first day and exclude the last; and you must also exclude from the count the time between the death of the intestate and the day of the grant of letters of administration to defendant; and, in this part of the count, you must not estimate as part of the time within which the statute runs, the 24th day of February, 1866, the agreed day of the death of defendant's intestate, but must estimate the 30th day of April, 1866, the day, when it is agreed, letters were granted; and in addition to said exclusion of time, you must further exclude from the count of time within which the statute runs, the six months that elapsed just after the appointment of defendant as administrator of the estate of R. J. Allen; and in the exclusion of time, you must not estimate the 30th day of April, 1866, the day on which letters were granted, as part of the time within which the statute was running, but must estimate the day on which said six months expired; and if, after having made said exclusions of time, six years had elapsed from the 21st day of September, 1865, to the day when the suit was brought, you must find for the plaintiff; and if said six years expired on Sunday, you must exclude that day from the count, and the plaintiffs could have brought this suit on the following day, Monday.* The defendant excepted to this charge, and excepted separately to those clauses, or portions of them, which are italicized above, and requested the court, in writing, to charge the jury, "that if they believed the evidence, they must find for the defendant." This charge the court refused to give, and the defendant excepted. The rulings of the court on the evidence, the charge given, and that refused, are the errors assigned.

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There was no evidence that the note sued on was ever presented to the defendant as administrator of the estate of R. J. Allen, deceased. The endorsement on the note was the only evidence offered by the plaintiffs, and this shows that the note was presented to B. P. Allen as administrator of R. N. Allen's estate. The note was made by R. N. and R. J. Allen, and this endorsement should have been excluded. The defendant should have been allowed to prove that the note was presented to him as a claim against the estate of R. N. Allen, but was presented with a clear disclaimer of any demand against the estate of R. J. Allen. The court erred in charging the jury that if the statute of limitations expired on Sunday, plaintiffs could sue on the Monday following. Suits on notes must be brought "within six years after the cause of action accrues."—Code, § 3226; *Owen v. Slater*, 26 Ala. 547; 29 Ala. 651; 15 Mass. 193. The statute is imperative, and makes no exception where the six years expires on Sunday. Where a note would otherwise fall due on Sunday, it becomes due on the Saturday before.—Code, § 2097; *Saunders & Harrison v. Ochiltree*, 5 Port. 73; 12 Mass. 89. On the same principle the statute of limitations would expire on Saturday, under the facts in this case. The appellees invoke the deductions made by the statute, but they can claim nothing but the time the statute requires to be deducted. The court erred in instructing the jury to "exclude the first and include the last day," in computing the time "between" the death of the intestate and the grant of letters, as well as in excluding the first day and including the last day in computing the six months in which the defendant could not be sued, after the grant of letters. By the language of the statute, you exclude from the count only the days *between* the day of death and the grant of letters. Only six months can be excluded, and not six months and one day.

WILSON & WILSON, for appellees.—The action was brought on the last day of the six years, excluding the time excluded by law between the death of appellant's intestate and the issuance of letters of administration, and the six months in which he could not be sued after their issuance, and without the exclusion of the first day and Sunday. The statute had not effected a bar when the suit was brought.—*Owen v. Slater*, 26 Ala. 547. Excluding the two days just mentioned, which the law excludes, the suit was begun three days before the statute of limitations had effected a bar.—Code, § 11. The presentation was proper, for appellant was sued as administrator of R. J. Allen's estate, and it was necessary for him to show that he was administrator *de bonis non* of R. N. Allen's



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estate before that evidence could have been admitted. The note had been presented to the administrator of R. N. Allen's estate long before its presentation to appellant.

SOMERVILLE, J.—It has been repeatedly decided by this court, that mere knowledge of the existence of a claim, on the part of an executor or administrator, no matter how full and complete it may be, will not prevent the operation of the statute of *non-claim*. To produce this effect, the statute is mandatory in the requirement of an actual presentation, or of some act done by the creditor or claimant which is equivalent thereto; otherwise the claim is forever barred and extinguished.—*Jones v. Lightfoot*, 10 Ala. 17; *Br. Bank Decatur v. Hawkins*, 12 Ala. 755; Code (1876) §§ 2597, 2599.

It is indispensable not only that the claim should be brought to the attention and knowledge of the executor or administrator, but this must be done by one having an interest in it and a legal right to enforce its payment, and it must be evinced by some act or word which indicates *an intention to look to the estate of the deceased debtor for its payment*. *McDowell, Adm'r, v. Jones, Adm'r*, 58 Ala. 25, 35; *Pollard v. Secor*, 28 Ala. 484.

The appellant should have been permitted to testify that the claim sued on was never presented to him as administrator of the estate of R. J. Allen, but only as a claim against the estate of R. N. Allen. The endorsements on the note were competent evidence, and relevant as bearing on this issue.

The note sued on was barred by the statute of limitations of six years.—(Code, 1876, § 3226). The running of the statute did not commence, by reason of its suspension, until September 21, 1865, under the provisions of Ordinance No. 5, of the Convention of 1865.—(Rev. Code, 1867, p. 53.)

The six months during which the administrator was exempt from suit, after the grant of letters of administration, is not to be taken as any part of the time limited for the commencement of the action, and must be excluded.—(Code, § 3245.) It is also provided in section 3244 of the Code, that “the *time between the death of a person and the grant of letters testamentary, or of administration, (not exceeding six months),*” is not to be counted in the estimate. This latter section, we think, is to be construed by including the day of the decedent's death and excluding the day on which letters were granted, in analogy to the construction given by this court to the above ordinance of September 21, 1865; which excluded from such estimate “the *time elapsing between the 11th day of January, 1861, and the passage of the ordinance.*”



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*Bernstein v. Humes*, 60 Ala. 582, 598; *Gamer v. Johnson*, 22 Ala. 494; *Owen v. Slatter*, 26 Ala. 547.

From September 21, 1865, to May 27, 1872, the day when the suit was instituted, was *six years, eight months and six days*. The deductions authorized to be made under the above statutes are, *six years, eight months and five days*.

The action was then barred by *one day*, unless the proposition urged by appellee be tenable, that, in as much as the 26th day of May, 1872, was Sunday, the plaintiff had until Monday, the 27th, within which to bring suit. Section 11 of the Code (1876) is invoked to sustain this view. It reads as follows: "The time within which an act is provided by law to be done must be computed by excluding the first day and including the last; *if the last is Sunday, it must also be excluded.*"

The statute, we think, was intended merely as a re-affirmation of the common law rule, that, while Sundays are generally to be computed in the time allowed for the performance of an act, if the last day happens to be *Sunday*, it is excluded, and the act must be performed on the day previous (Saturday.)—2 Bouv. Law Dict., title "SUNDAY," § 4; *Sanders v. Ochiltree*, 5 Port. 73.

The suit should have been brought on the 25th day of May, 1872. The court erred in its charges given as to the bar of the statute of limitations, and also in refusing to give the charge requested by the appellant, who was defendant below.

Reversed and remanded.

## Lovins et al. v. Humphries.

### *Motion for Summary Judgment against Sheriff for Failing to pay over Money Collected on Elections.*

1. *Sheriff; when entry of motion against, not notice to.*—The entry, on the motion docket, of a motion against a sheriff, whose term of office has expired, for failing to pay over money collected on execution, does not operate as notice of the motion.

2. *Summary judgment; when motion for, discontinued.*—When no notice is given of a motion for summary judgment, and no action is taken on it, at the term at which it was entered, such motion is discontinued.

3. *Same; allegations and proof must correspond, on motion for.*—When an execution is described in a motion against the sheriff, for failure to pay over money collected on it, as issued in favor of one person, and the evidence introduced relates to an execution in favor of a different person, the variance is fatal.

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4. *Same ; notice and motion for, joint proceeding.*—When a notice is given to, and a motion made against, a sheriff, for failing to pay over money collected on an execution issued in favor of several persons, the notice and motion form a joint proceeding, and it is error to render judgment on the motion in favor of one of the plaintiffs in execution.

5. *Same ; when motion for, made by transferee must prove interest of transferor.*—Where a motion was made by the transferee of a judgment against the sheriff, for failing to pay over money collected on the execution issued upon it, and the transfer did not mention the judgment, but assigned the transferor's interest in an estate which was not shown to have any connection with the judgment, evidence that the judgment was embraced in the transfer, and of its connection with the estate, was essential to support the movant's right to the money collected.

6. *Judgment ; is not such a contract as that transferee may sue in his own name.*—A judgment is not such a contract as comes within the influence of the statute, (Code, § 2099), authorizing indorsees to sue on written contracts for the payment of money in their own names, and the transferee of a judgment cannot sue on it in his own name.

7. *Same ; when assignee of, cannot maintain action on.*—When one of several plaintiffs in execution assigns his interest in the judgment, the assignee can not maintain a separate action against the sheriff for failing to pay over money collected on the execution, unless it was based on his express promise to pay to the transferee that part of the money to which the transferor would be entitled.

#### APPEAL from Etowah Circuit Court.

Tried before Hon. W. L. WHITLOCK.

There was a motion entered on November 3, 1879, in the Circuit Court of Etowah county, by Amanda Humphries, S. L. Glass, Mary P., S. L., A. J., and Wm. G. Heald, against W. H. Lovins and the sureties on his official bond, as late sheriff of Etowah county, for a summary judgment, for failing to pay over the sum of nine hundred dollars alleged to have been collected by him on an execution, issued in favor of the movants against E. I. Holcombe. The record does not show that any notice of this motion was given to the defendants, or that any action of the court was had on it at the term of the court, when it was entered. There appears, however, in the record a motion against the same defendants, made by John T., and Amanda Humphries, in which they sought to recover a judgment for \$153.60 against the defendants for a failure to pay over that sum of money, collected on an execution alleged to have been issued in favor of the movants against E. T. Holcombe. Of this last motion notice was given the defendants, who demurred on the ground—1. That it was not alleged that Lovins was sheriff at the time the motion was commenced ; 2. That the motion was too indefinite and uncertain as to the plaintiffs. The court overruled the demurrer. The defendants pleaded, in substance, that the plaintiffs in execution had received the money due them, except W. G. Heald, who had died before the rendition of the judgment, and on whose estate there had been no administration ; and that they did not owe the amount

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claimed, and "were not guilty of the defaults charged against said W. H. Lovins." On the trial, which was had before the court without a jury, the movants, after introducing in evidence the bond of the sheriff, introduced an original execution in favor of W. G. Heald *et al.* against L. T. Holcombe for nine hundred dollars, on which was indorsed a receipt in full, payment by the defendant, Lovins. The movants also read in evidence portions of the "execution docket," showing the receipt by Amanda Humphries, Mary A. Glass, S. L., A. P.,<sup>1</sup> and H. P. Heald, of five-sixths of said judgment against Holcombe. The deposition of Amanda Humphries was read in evidence on behalf of the movants, from which she testified that her brother, W. G. Heald, who died in 1874 or 1875, had an interest in the estate of Harmon Heald which he transferred to her for \$350 or \$400, but this transfer was lost, and although she had made diligent search for it through all the papers in her house, it could not be found. This evidence was objected to by the defendants, but the court overruled the objection, and defendants excepted. A witness testified that he wrote and witnessed the transfer made by W. G. Heald to Amanda Humphries of all his interest in the estate of Harmon Heald. The defendants objected to this evidence as illegal and irrelevant, and because the written transfer was not produced or accounted for, but the court overruled the objection, and defendants excepted. The court rendered a judgment in favor of the movants for \$247.79. The errors assigned are, the rulings on the evidence, overruling the demurrer to the motion, and the rendition of the judgment against the defendants.

AIKEN & MARTIN, for appellants.—The execution which was read in evidence was in favor of W. G. Heald *et al.* v. Holcombe, while the notice alleged that the execution was in favor of Amanda and John T. Humphries. This is a fatal variance.—*Spence v. Ruttings*, 11 Ala. 557. The court erred in overruling the demurrer.—*Brazel v. Smith*, 5 Ala. 206. The judgment must be rendered in favor of the plaintiff in the execution, and cannot be rendered in the name of a transferee of the judgment. Amanda Humphries could not prosecute this motion alone and recover judgment for the full amount collected on the execution, for the law presumes that all the parties were equally interested in the judgment.—*Erwin v. Rutherford*, 1 Yerg. 169. The pleas in the case were sufficient.—*Shute & Hockett v. McRae*, 9 Ala. 931. The motion was discontinued.—*Armstrong v. Robertson & Barnwell*, 2 Ala. 164.



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J. L. CUNNINGHAM, for appellee.—(No brief has come into the hands of the Reporter.)

BRICKELL, C. J.—The motion entered against the appellant at the Fall term, 1879, of the Circuit Court, must be regarded as having been abandoned and discontinued. No notice of it was given, nor was any action whatever, so far as it appears from the record, taken at that term. The term of office of the sheriff having expired, the entry of the motion on the motion docket did not operate as notice.—Code of 1876, § 3353; *Armstrong v. Robertson*, 2 Ala. 164.

The second motion was founded on the default of the sheriff in failing to pay over money collected on an execution issuing in favor of John T. Humphries and Amanda Humphries, against E. I. Holcombe. The evidence offered tended to show the money was collected on an execution issuing in favor of W. G. Heald *et al.* v. Holcombe. The variance was fatal; and it was manifest error in the Circuit Court, to render judgment for the failure of the sheriff to pay over money collected on an execution different from the one described in the notice and motion.

The motion and notice formed a joint proceeding, in which the plaintiffs must have recovered jointly, not severally. There was also error in the rendition of judgment in favor of the appellee, solely and severally.

The loss of the transfer or assignment of the interest of William G. Heald in the estate of Harmon Heald, to Amanda Humphries, was shown, and secondary evidence of its contents was admissible. There was an absence of evidence that the judgment against Holcombe was embraced in the transfer, or that it had any connection whatever with the estate of Harmon Heald. Such evidence was essential to support the right of the transferee to the money it appears the sheriff had collected on an execution in which the transferor was one of the plaintiffs.

Contracts in writing for the payment of money or other things, or the performance of any act or duty, are assignable by indorsement so as to authorize an action thereon in the name of each successive indorsee.—Code of 1876, § 2099. In its most enlarged sense, a judgment may be regarded as a contract for the payment of money, yet that is not its ordinary signification.—*Keith v. Estell*, 9 Port. 669; *Smith v. Harrison*, 33 Ala. 706. That a judgment is not within the influence of the statute to which we have referred, and that an assignment of it will not authorize the assignee to sue in his own name, was settled in *Bunnell v. Magee*, 9 Ala. 433. If the assignment or transfer made by William G. Heald em-

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braced the judgment against Heald, the transferee could not in her own name maintain a summary proceeding against the sheriff for failing to pay over money collected on an execution issuing on the judgment.

The transfer was made by one of several plaintiffs in execution. It passed, doubtless, the right of the transferor to that part of the money collected to which he was entitled in severalty. In no event could it have passed the right to the assignee to maintain a separate action against the sheriff, unless it was founded on an express promise to pay her the part of the money collected, to which the transferor was entitled. Neither by assignment or otherwise, could the sheriff be subjected to separate actions by the parties having interests in a joint judgment.

It is not necessary to notice other errors in the record; we have pointed out such as will probably prove fatal to this proceeding.

Reversed and remanded.

## Casey et al. v. Morgan et al.

### *Statutory Real Action.*

1. *Adverse possession; when purchaser of lands at executor's sale does not hold.* When, at a sale of lands made by an executor under orders of the Probate Court, a conveyance is made to the purchaser, without a report or confirmation of the sale, without a report that the purchase-money had been paid, and without an order of the court to make titles, such a conveyance will be ignored, and the purchaser does not hold adversely, so that his possession will ripen into a title by the expiration of ten years.

2. *Heirs; no defense to suit at law by administrators to recover lands that heirs have received purchase-money.*—It is not a defense to an action at law, brought by administrators to recover the lands of the estate, that the heirs were present at a sale of the lands made under the orders of the Probate Court, and had received their shares of the purchase-money, no deed having been made to the purchaser.

### APPEAL from Cleburne Circuit Court.

Heard before Hon. JOHN HENDERSON.

On December 20, 1875, John T. Casey and Z. T. Acker, as administrators of the estate of Thomas White, deceased, brought this action against Thomas Morgan and Looney Sanford, to recover a tract of land in Cherokee county, Alabama. The defendants pleaded—1. *Ne unques administrator*; 2. Not guilty; 3. Statute of limitations of ten years; 4. That the land was sold by the executor of T. White's will, and the heirs had received their distributive share of the

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proceeds of sale, and had receipted therefor. A demurrer, which was interposed to the fourth plea was sustained. On the trial, the plaintiffs proved that Thomas White resided on the land sued for, and claimed it as his own for seven or eight years prior to his death, which occurred in 1843; that after his death his widow and his family occupied the land until 1863; that they were appointed administrators *de bonis non cum testamento annexo* of Thomas White in 1875; that in February, 1866, Wm. White, one of the former executors who sold the land in controversy, petitioned the Probate Court, as such executor, to set aside a settlement of the estate made at a former term of said court, thus showing that said White then recognized his trust as such executor. The defendants introduced the record of the probate of Thos. White's will, and the record of an order made by the Probate Court on May 25, 1863, allowing W. C. White, as the executor of the will of Thos. White, to sell the lands sued for on a credit of twelve months, with interest from date, and requiring a return to the court. On September 8, said White filed what purports to be a return of the sale of real and personal property sold by him as executor, in which is the statement as to the sale of the land, which is set out in the opinion of the court. Defendants introduced H. Sanford as a witness, who testified that Geo. White and W. C. White, executors of Thomas White's will, sold the land sued for in September, 1863, to A. O. Stewart under the said order; that a deed, which witness wrote, was made by said executors to said land, and that a day or two afterwards, said Stewart made a deed to W. C. White, conveying the same lands to him. There was no change in the possession of the lands. Stewart rented them to a son of W. C. White, and did not take possession of the land up to the time when it was sold in bankruptcy, as the property of said W. P. White; that many of the heirs were present when the lands were sold, and bought personal property at the same sale, and did not set up claim to the lands; that White admitted that Stewart bought the land for him, and that the purchase was for his benefit. The court charged the jury: "If the jury believe the said W. C. White, and those claiming under him, had been in the adverse possession of said lands under said sale continuously for ten years prior to the commencement of this suit, plaintiffs cannot recover; that plaintiffs are barred by the statute of ten years; that during the war, and up to the 21st day of September, 1865, we had no statute of limitations, and at that time the statute was in force, and that the statute of limitations began to run, if it run at all, on the 21st day of September, 1865; that the right of the heirs of



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Thomas White, deceased, to sue for said lands accrued at the sale of said lands by said executors in September, 1863. To which charge, and each part and parcel thereof, plaintiffs excepted." The plaintiffs requested the court to charge the jury as follows: 3. "If the jury believe from the evidence that William White procured Mr. Stewart to bid off said land for him, and that White executed a deed to said land, and Stewart immediately, on the same day, or the day afterwards, executed a deed to said land to White, that Stewart never went into possession of said lands, and that White continued to rent out said land, and this is all the evidence going to show notorious hostile possession, and adverse to the heirs, then the jury must find for the plaintiffs." 4. "If the jury believe from the evidence that Wm. White sold said lands as the executor of the estate of Thomas White, and procured Mr. Stewart to buy in said lands for him, and White executed a deed to said land to Stewart, and on the day of sale, or the day afterwards, Stewart executed a deed to said land to White, and that Stewart never went into possession of said land, and the only evidence of a notorious, adverse, and hostile possession by White, against the estate, and the heirs of the estate, is the fact that White, although he never went into possession of said land, but rented it out, and the fact that he reported to the Probate Court that Stewart was the purchaser, then this is not enough to constitute a notorious, hostile, and adverse possession in White, unless the evidence further shows that the estate, or heirs thereof, knew such possession to be the intention of White, or that he communicated his hostile holding to the estate or heirs thereof." 5. "That White being an executor of the estate, could not by mere possession of the lands, having obtained it as the evidence shows he did, constitute in himself an adverse and hostile possession of the land, unless the proof shows he communicated to the heirs that he intended such possession to be hostile to them and the estate, or the estate or heirs derived a knowledge of such hostile and adverse possession and intention of White from some other facts shown in evidence." 6. "The burden of proof to show an adverse possession in this case is upon the defendants, and if the evidence in this case fails to satisfy the jury that there was such an adverse possession, then the verdict must be for the plaintiffs." These charges the court refused to give, and plaintiffs excepted. There was a verdict for defendants, and plaintiffs bring the case to this court, and assign the charge of the court, and its refusal to give the charges asked, as error.

M. J. TURNLEY, and DENSON & DISQUE, for appellants.—The

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title to the land was never divested out of the heirs of White, for the sale was not confirmed, and there was no conveyance ordered by the court.—*Doe v. Hardy*, 52 Ala. 291; *McCullough v. Chapman*, 28 Ala. 125. There was no evidence that the purchase-money of the land had been paid. White was acting as administrator in 1866, and the ten years had not elapsed from that time until this suit was brought, and it is manifest he could not, while acting as executor, set up an adverse holding in himself against the estate. All the charges should have been given. The court has the right to tell the jury what facts do or do not constitute adverse possession, and the jury determine whether the facts exist; and the burden of proving adverse possession was on the defendants. Adverse possession will not be presumed, but must be made out by clear and positive proof.—*Herbert v. Hanrick*, 16 Ala. 581; *Jackson v. Berner*, 48 Ala. 203. The statute of limitations could not run until some one was appointed administrator, and no one was appointed until February, 1868. *Hoffer v. Steele*, 18 Ala. 828; *Dawson v. Lay*, 24 Ala. 184; *Wyatt v. Rambo*, 29 Ala. 510. The general charge invaded the province of the jury in not permitting them to say when the statute of limitations commenced to run, and it was for the jury to say when the adverse possession commenced.

McCONNELL & SAVAGE, for appellee. (No brief on file.)

STONE, J.—All the parties to this suit must be held estopped from disputing Thomas White's ownership and title of the lands in controversy at the time of his death in 1843. Under the terms of his will, his widow had a life estate in the lands, which she enjoyed. She died in 1863. The will confers power on the executors to sell the land, after the termination of the life estate, for division among the testator's children, heirs at law. The executors appear not to have acted under this testamentary power, but they obtained from the Probate Court an order to sell the land on twelve months credit, and sold under this order, in the year 1863. Stewart became the purchaser at the price of \$4,050, as is shown by a return made to the Probate Court by the executors, setting forth a sale of both personal and real property belonging to the estate. This return is not a report of the sale of the real estate, for it fails to set forth what security, or whether any, was exacted or taken from the purchaser. Its entire language relating to the land is, "1 tract of land, 320 acres, Sw.  $\frac{1}{4}$  Sec. 16 and Se.  $\frac{1}{4}$  Sec. 17, T. 12, R. —, to A. O. Stewart, \$4,050." No action was had by the court on this return, except that it was sworn to before the judge of



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probate. No report of sale was ever made, no report of payment of the purchase-money, and of course there was not, and could not be any confirmation of the sale, or order to make title to the purchaser. There is oral proof, but not objected to, that on the day of sale—September 7, 1863—the executors conveyed the land by deed to Stewart, and that on that or the next day Stewart re-conveyed the lands to W. C. White, one of the executors. W. C. White was in possession before, and at the time of the sale, and he continued in possession until he became a bankrupt. The lands were sold by his assignee in bankruptcy, and the present defendants claim as purchasers under that sale.

The present suit is by administrators *de bonis non* of Thomas White, with the will annexed, and was commenced December 20th, 1875. The defense relied on is the statute of limitations of ten years. Ten years had not elapsed, after the sale and conveyance by the assignee in bankruptcy. Hence, to complete the bar, defendants must date their adversary holding from the sale and conveyance to Stewart. The sale was made in 1863, while the statute of limitations was suspended. It did not commence running until September 21st, 1865. From that time till this suit was brought was ten years and three months. The question, then, is, was Stewart's or White's possession adverse, so as to ripen into a title in ten years? The conveyances, first to Stewart, and then back to White, being made without report and confirmation of sale—without report that the purchase-money was paid, and without an order of court to make title, must be treated as if no such conveyances had been made.—*Doe v. Hardy*, 52 Ala. 291; *McCullough v. Chapman*, 38 Ala. 325. Stewart, then, and White after him, stood on no firmer ground than if they had been executory purchasers, without any claim that a conveyance had been made to either of them. They were not adverse holders in that sense, which will ripen into a title in ten years.—*McQueen v. Ivey*, 36 Ala. 308; *Collins v. Johnson*, 37 Ala. 304; *Taylor v. Dugger*, 66 Ala. 444. Several rulings of the Circuit Court are in conflict with these views.

It is urged by appellees that most, or all of the heirs of Thomas White, deceased, were present when the lands were sold to Stewart, and bought property at the sale; and they have received and enjoyed their part of the purchase-money of the land. Whether that defense could be successfully made in any court against a suit by administrators, would depend on the inquiry whether the lands were wanted for the purposes of administration proper. But such defense cannot avail in a suit at law for lands. It can only be in-



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voked in equity.—*McPherson v. Walters*, 16 Ala. 714; *Elliott v. Br. Bank*, 20 Ala. 345.

For the errors pointed out above, the judgment of the Circuit Court is reversed, and the cause remanded.

## Walker v. Radford.

*Bill in Equity by Mortgagee to Prevent Removal of the Mortgaged Property out of the State.*

1. *Removal of mortgaged chattels out of the State; equity will prevent.*—A court of equity will interfere, before the law day of the mortgage, and before the mortgagee has a right to proceed at law, and restrain the removal of the mortgaged property beyond the jurisdiction of the court.

2. *Seizure, writ of; allowed under statute to prevent removal of mortgaged property.*—When a case for equitable interference is shown, the statute (Code, §§ 3857-3863) authorizes a writ of seizure to prevent the removal of mortgaged property beyond the State, instead of an injunction, which would be the appropriate remedy in the absence of the statute.

3. *Removal of mortgaged property out of the State; ground of equity to prevent.* The ground of equitable interference, in such cases, is the prevention of injury to the present or future rights of the mortgagee, and the injury must be shown, and it must appear that the mortgagor, or those claiming under him, have done, or are about to do, some act which violates the mortgagee's rights and beyond the rights of the mortgagor, and for which the law does not give an adequate and appropriate remedy.

4. *Same; temporary removal of property no ground for equitable interference.* But the mortgagor is not to be hindered in the legitimate use of the property, and a mere temporary removal of the property out of the State, accompanied by an honest intention to return it before the law day of the mortgage, and without any intention to affect, embarrass, or impair the rights of the mortgagee, will not authorize a court of equity to interfere by injunction, or the statutory writ of seizure, to prevent the removal of the property.

This was a bill in equity, filed on April 5th, 1877, by Ida H. Walker, against Mary E. Radford, and alleged that the complainant was a married woman, and the wife of R. H. Walker, who carried on business for her as her agent in Columbia, Henry county; that on February 10th, 1877, her husband took a mortgage for over \$100 from John T. Radford and E. F. Griffin, to secure whatever account said Radford should make in her store for supplies for the year 1877, and executed a promissory note to complainant, or her agent, for \$150, payable October 1, 1877, the said note being for an amount which it was supposed would cover the amount of supplies said Radford would need in making a crop for 1877. The property included in the mortgage was two horses and a wagon, and some cattle, and October 1, 1877, was the law

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day of the mortgage. Radford bought supplies to the amount of \$78. About March 9, 1877, he was killed, leaving his widow, the appellee, in the possession of the property. The bill then averred that Mary E. Radford was about to leave the State of Alabama, and intended to take the mortgaged property with her; that the mortgage debt was a part of the *corpus* of her statutory separate estate; that J. T. Radford left but little other property; that if the mortgaged property was taken out of the State, complainant would lose her debt. The bill prayed for a writ of seizure, to be levied by the sheriff, on the mortgaged property. The answer of Mary E. Radford admitted the facts set out in the bill, except that said Radford's account amounted to \$78.96, but denied that she intended to remove any of the property out of the State of Alabama permanently, or to remove the cattle at all. She admitted that she was preparing, after the decease of her husband to visit her mother, who resided in Georgia, and that she intended going in the wagon, and with the horses mortgaged to appellant, but denied that she intended to keep them in Georgia; that she owned part of the land which was being cultivated by her husband; that arrangements had been made with one Seaborn Shinbolster to complete the crop commenced by her husband, and that said horses and wagon were to be used in making said crop. The answer also denied that the complainant was in danger of losing her debt, or the property in danger of being wasted, and defendant also claimed the mortgaged property.

The register issued the writ of seizure, and it was levied upon the mortgaged property, which was replevied by the appellee. Numerous witnesses were examined, and the only positive testimony that defendant was about to leave the State and take the mortgage property with her, was that of complainant's husband, who testified that defendant told him she was going to leave the State and take the property with her, but there was no testimony that defendant was going to take the property permanently out of the State, and she testified that she intended to return with it. The Chancellor quashed the writ of seizure, and dismissed the bill. His decree is assigned as error.

J. WYATT OATES, for appellant.

J. I. COWAN, for appellee.

BRICKELL, C. J.—The bill is filed by the appellant, a mortgagee of personal property, before the maturity of the mortgage debt, and while the mortgagor was entitled to pos-

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session to prevent the removal of the property beyond the State. A court of equity has jurisdiction to restrain the mortgagor of lands, in possession, from committing waste, if thereby the security for the mortgage debt is rendered inadequate. Upon the same principles, the court will interfere to restrain injuries to, or the removal beyond, the jurisdiction of the court of chattels subject to mortgage; and the court will interfere before the law day of the mortgage, and before the mortgagee has a right to proceed at law.—High on Inj. § 447. The statute (Code of 1876, §§ 3857-63), when a case for equitable interference is shown, would authorize the issue of a writ for the seizure of the property, if the mode of procedure it prescribes is observed, instead of an injunction which would be the appropriate remedy in the absence of the statute.

The ground of interference is the prevention of injury to the future or present rights of the mortgagee, for which the law does not furnish an appropriate and adequate remedy. The injury must be shown, and it must be shown that the mortgagor, or those claiming under him, are about doing, or have done, some act which is violative of the rights of the mortgagee, and beyond his right as mortgagor in and entitled to possession. If it is conceded to the appellant, that a removal of the personal property beyond the jurisdiction of the court was apprehended, and was intended and about being made, it was a mere temporary removal, not intended to be continued until the maturity of the debt, and the law day of the mortgage. Nor does it appear there was any increased probability of deterioration in value because of the mere temporary removal, or that in consequence, the rights of the mortgagee were placed in serious jeopardy. It is the jeopardy of the rights of the mortgagee by the removal of the property beyond the reach of his legal remedies when he is entitled to resort to them, that forms a ground of equitable interference. As it is in cases at law, a ground for an attachment at the suit of a creditor, that his debtor is removing his property beyond the State, without the jurisdiction of its courts, depriving him of the legal remedies he may here pursue. But it is not intended that the mortgagor, or the debtor, shall be hindered and denied the legitimate use of the property, in subservience of his convenience or pleasure. A mere temporary removal of the property, for use and convenience, not intended to affect the rights of the mortgagee, or to embarrass, or to impair them, accompanied by an honest intention to return it to the State, before the legal rights of the mortgagee will attach, will not justify a court of equity in intervening by injunction, or by the issue of the statutory



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writ of seizure. The removal must place his rights in jeopardy, and it must be inconsistent with a legitimate use of the property by the mortgagor. The removal intended, was of horses and a wagon, by the widow of the mortgagor, in making a brief visit to her mother in Georgia, with a manifest intention of returning before the law day of the mortgage, and afforded of itself no ground for a reasonable apprehension, on the part of the mortgagee, that the property would not be forthcoming when his legal rights should attach. For this reason, without regard to any other question which is supposed to be involved, there is no error in the decree of the Chancellor.

Affirmed.

## Shirley et al. v. Teal.

*Bill in Equity by Judgment Creditor to have Mortgage Declared General Assignment.*

1. *General assignment ; mortgage conveying substantially all debtor's property is.*—A mortgage conveying substantially all the debtor's property for the security of a particular creditor, or creditors, to the exclusion of others, the intention of which is to secure a preference to the former over the latter, operates as a general assignment for the benefit of all the creditors of the grantor equally.

2. *Same ; age of debt not material when mortgage held to operate as.*—In such a case the mortgage operates as a general assignment, although it was executed to secure, in part, money to be advanced by the mortgagee to the mortgagor, since the statute prohibiting preferences makes no distinction as to the age of the debt.

3. *Same ; conveyance of exempt property not held to be.*—When a debtor conveys, by mortgage, substantially all his property, to a creditor, intending thereby, to give him a preference, it will not operate as a general assignment of any property which is exempt from levy and sale under execution.

4. *Same ; when decree declaring mortgage of exempted property to be, not erroneous.*—A decree declaring a mortgage which conveys, substantially, all the debtor's property to a creditor, in preference to his other creditors, to be a general assignment, is not erroneous, if the mortgage conveyed any property not exempt from legal process issued to enforce the mortgagor's debts.

### APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in chancery, filed November 27, 1877, by Arnold Teal against Jas. S. Shirley and Fox Henderson. The bill alleged that James S. Shirley and wife executed a mortgage to Henderson & Co., on certain lands in Bullock county, and the crops raised thereon ; that the defendant, Fox Henderson, was a member of said firm, and the only

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one interested in said mortgage; that at, and before, the time when this mortgage was executed, the complainant was a creditor of said Shirley, the debt being evidenced by a promissory note made by Shirley, and one Kelly, and on which complainant recovered a judgment for \$279, at the April, or Spring Term, of the Circuit Court of Pike county; that Kelly is insolvent; that the mortgage made by Shirley to Henderson & Co., conveyed, substantially, all his property; that it contained a "waiver clause of exemptions," and was signed by the wife of Jas. S. Shirley, who was examined apart from her husband, and her acknowledgment taken as required by law; that the law day of the mortgage had passed; that it hindered and delayed complainant in the collection of his debt; that if said property was sold the proceeds would be more than sufficient to pay the mortgage. The bill prayed that an account be taken of the amount due complainant and said Henderson, and that a sale of the mortgaged property be decreed to satisfy both debts, charging against said Henderson all the proceeds of the mortgaged property which he had received, and for general relief. The answers admitted the facts set out above, but denied any intention to hinder or delay complainant in collecting the debt, and averred that it was given in good faith and for a valuable consideration. The answer of Fox Henderson stated that the mortgage executed by Shirley to Henderson & Co. embraced all the available property owned by said Shirley to secure a balance due from a preceding year, and the further advances stipulated for in the mortgage, which were made to enable the mortgagor to make a crop on the mortgaged premises.

The court sustained a demurrer to the bill because all the members of the firm of Henderson & Co. were not made parties, and they were then brought in as parties. Jas. S. Shirley amended his answer, making it a cross-bill, and claiming that one hundred and sixty acres of the land described in the mortgage was exempt to him as a homestead under the laws of Alabama, and also, one thousand dollars, in value, of personal property, which is set out specifically in the cross-bill, and some of which appears in the mortgage to Henderson & Co. This cross-bill prayed that this property might be set apart to him as exempt. The Chancellor rendered a decree declaring that the mortgage to Henderson & Co. operated as a general assignment, and referred it to the register to state an account of the debts due complainant, and Henderson & Co., ascertaining the amount advanced annually by Henderson & Co., to Shirley, to enable him to make crops, and the value of the proceeds of the crop realized by Hen-

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derson & Co., and which should be applied each year to satisfy the lien of Henderson & Co. on such crops, and the surplus be directed to be applied to the payment of the mortgage debts. This decree is assigned as error.

JOHN D. GARDNER, for appellants.—The mortgage is certainly not a general assignment, so far as it conveys the homestead of Jas. S. Shirley, and other property included in the claim of exemption, for such a conveyance could not be assailed for fraud upon creditors.

W. H. PARKS, for appellee.—The mortgage made by Shirley embraced all his property, and was, therefore, a general assignment. It also contained a waiver of exemptions, and no exemptions can therefore be had under it against Teal's debt, for that was, in legal effect, included in it. The debt due by Shirley, and secured by the mortgage, was a balance carried over from a preceding year, and in addition, advances to make a crop, so that even in the event of a simple foreclosure, the rule established by the Chancellor was the correct one.

SOMERVILLE, J.—The only assignment of error presented by the record in this case is, that the Chancellor erred in declaring the mortgage executed by J. S. Shirley and wife, on January 5th, 1877, to J. A. Henderson & Co., to be a general assignment. The consideration of the mortgage is recited to be a debt due by Shirley to the mortgagees "by crop-lien note," of even date with the instrument, for the sum of \$1,200, and "to further secure the payment of said sum, *together with any amounts that may be advanced under said lien note.*" The pleadings and proof show that this note was intended to secure the balance due from Shirley to the mortgagees upon an old indebtedness, and whatever additional sum might be advanced during the current year to enable Shirley to make a crop.

It is a plain and well settled proposition of law that a mortgage, or deed of trust, which conveys *substantially all the debtor's property* for the security of one or more particular creditors, to the exclusion of others, the intention of which is to secure a preference or priority of payment to the former over the latter, operates as a general assignment under the statute, and enures to the benefit of all the creditors of the grantor equally.—Code, (1876), § 2126; *Warren v. Lee*, 32 Ala. 440; *Stetson & Co. v. Miller*, 36 Ala. 642; 1 Brick. Dig. p. 130, § 97.

The purpose of the statute (Code, § 2126) is to prohibit a debtor from exercising the right which he had at common



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law to prefer one creditor to another, where he seeks to do so by disposing of all of his property by mortgage or other like security. Its policy is similar, in nature and design, to that of all bankrupt laws, which is to secure a *pro rata* distribution of the assets of insolvent debtors equally among all his creditors. The fact that all of the grantor's property, or, substantially all, is included in the conveyance, seems, in such cases, conclusive of the fact of his insolvency.

The fact is not denied, that, in this case, Shirley included all of his property in the mortgage to Henderson & Co. The instrument was clearly a general assignment, and is none the less so by reason of being executed to secure, in part, moneys promised to be advanced to the mortgagor by the mortgagees *in futuro*. The statute prohibits the giving by a debtor of a preference or priority of payment, by general assignment, to one or more creditors. It makes no distinction between the creditor of a day and one of an hour. The age of the debt is not material.—Code, 1876, § 2126; *Lovell v. Webb*, 62 Ala. 271.

It is urged, however, by the counsel of the appellant, that this mortgage cannot be held a general assignment as to any property conveyed by it, which is shown to be exempt from execution in behalf of the debtor, at the time of its date and delivery. We think the principle invoked is a sound one, because no creditor can be considered as suffering prejudice by a sale or mortgage of such property.—*Lehman, Durr & Co. v. Bryan*, (MSS. present term.) It cannot be contemplated that the statute under consideration intended to interfere with, or restrict the well established rights of a debtor in disposing of his exempt property. No conveyance or transfer of property of this description would, in our opinion, be such a preference as to come within the evils designed to be prohibited by the legislature. The debtor is authorized by law to claim his exemptions against all of his creditors. We cannot appreciate the force of the logic which would convert a special waiver in favor of one, into a general waiver in favor of all.—Thomp. Homst. & Ex. § 421; Burrell on Assign. § 96-7; Bump on Fraud. Con. § 268.

But the evidence does not clearly show that the property conveyed by the mortgage, and that described in the schedule of exemptions is identical, nor is there any sufficient averment to that effect in Shirley's answers. It is manifest, however, that some of it appears to be the same. We cannot conclude, therefore, that the Chancellor erred in simply declaring the mortgage a general assignment, for the conclusion would be proper if it conveys any property not exempt from legal process issued to enforce the mortgagor's

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debts. So far as the exempted property is concerned, it remains unaffected by the decree, the question of such a claim being a matter for future determination, and a proper subject of reference to the register, under appropriate instruction from the Chancellor.

The decree is affirmed.

## Mayrant & Company v. Marston, Brown & Company.

### *Bill in Equity for Settlement of Partnership Accounts.*

1. *Written contract; prior negotiations not contained in, presumed abandoned.* When parties have reduced their contract to writing, all prior negotiations not carried into the writing, are presumed to be abandoned.

2. *Partners inter sese; what constitutes.*—Parties do not become partners *inter sese*, unless there is a stipulation in the agreement for a community of risks, as well as a partition of gains.

3. *Same; particular contract held not to constitute.*—A contract by which two firms agreed to divide equally the profits of their business, after excluding a certain portion of such profits “to cover expenses,” stipulating, also, “that the business of their respective firms should be conducted entirely separate,” neither being bound to contribute anything to the expenses or losses of the other, does not constitute the two firms partners *inter sese*.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill filed by Marston, Brown & Co., against Mayrant & Co., and the material averments were that each of said firms were engaged in the business of compressing and shipping cotton in the city of Mobile, each having steam presses in operation, and instead of competing with each other, they entered into an agreement on the 22d of November, 1875, by which it was stipulated, that “each firm” should be “allowed to enjoy, without division, all the benefits derived from bills for shipping charges and compressing on the first fifty thousand bales of cotton compressed, which quantity we consider as requisite to defray the necessary expenses of the business of each firm. On every bale of cotton compressed by either firm over and above fifty thousand bales, the amount derived from bills of shipping charges, and compressing, on said excess of cotton is to be divided equally among our respective firms, after first deducting forty cents per bale for the expense of labor and handling the cotton, settlements to be monthly, say the 15th of each month. The

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business of our respective firms to be conducted entirely separate, in all respects, as we have no desire whatever to form any combination detrimental to the interests of others, or objectionable in the eyes of the community. We agree to carry out the above agreement in the utmost good faith until the first day of September, 1876, the agreement to commence on Nov. 22, 1875." Complainants averred that they kept a true account of the cotton compressed and shipping charges earned by them, and prior to July 24, 1876, rendered an account thereof to Mayrant & Co., a copy of which they attached to the bill. On that day they wrote to Mayrant & Co., asking why the latter had declined to furnish an account. This was not answered, but in reply to a second letter from complainants, Mayrant & Co. stated that they would make a statement of their business. This, the bill alleges, they failed to do, and to make monthly or other settlements with complainants, of the net earnings of their business as provided by the agreement; that Mayrant & Co. had compressed and collected shipping charges on sixty-nine thousand bales of cotton; that all over thirty thousand bales was subject to be divided, together with the net earnings on six thousand four hundred and eighty-two bales compressed and handled by complainants according to the agreement; that while the agreement was in force the steam press of R. W. Mayrant "got out of order" and needed repairs, and while the repairs were being made, Mayrant & Co. hired another press to do their compressing, and claim that the cotton so compressed did not come within the agreement; that they cannot state the number of bales compressed by Mayrant & Co., nor the profits made on them, but complainants insisted that Mayrant & Co. were liable to account for the profits on the cotton which had been compressed for them by other presses; that complainants' press had also broken down, and they had hired other presses to work for them, but that they had included this cotton in the statement of the business done under the agreement. The bill then states the number of bales of cotton compressed by Mayrant & Co., and on which they had collected the shipping charges, so far as they could do so—giving the charges for compressing the different classes of cotton, foreign bound or coastwise—and claims that there was a balance of about \$3,373.42 due them from Mayrant & Co., which the latter refused to pay.

It is averred that complainants are remediless at law, and that the bill prayed for a discovery of the number of bales of cotton compressed by Mayrant & Co., and what amount they received as compressing and shipping charges thereon; that the register state an account in ac-



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cordance with the agreement between complainant and defendant, and all the affairs of such partnership as contemplated by the agreement be closed and settled up. Mayrant & Co. answered the bill, and set up the fact that all persons engaged in the compressing business in Mobile, had entered into an agreement fixing a uniform tariff of charges, permitting, however, any press to carry out any contract previously made without reference to such tariff of charges. The tariff of charges thus fixed, was higher than the specific contracts exempted from its operation; that a short time after this tariff was agreed on, they entered into the agreement with the complainants, which was set out in the bill, and which they aver was based on the tariff of charges, and was not intended to amend or disturb the specific contracts of charges exempt from its provisions. These contracts were not completed when they entered into the agreement with complainants, but were to be completed, and cotton compressed on these contracts was not embraced, or intended to be embraced, under said agreement; that complainants agreed that if defendants' press broke down, they might use one of theirs until Mayrant & Co.'s press could be repaired; that said partnership agreement was never acted on, and was annulled by both parties, in that defendants' press broke down, and they applied to complainants to use one of their presses, which was idle, and complainants refused to allow them to do so; that they then hired other presses to compress for them; that they hired complainants press to compress five thousand eight hundred and ten bales of cotton; that none of this cotton, compressed by hiring presses, was compressed by defendants, within the true meaning of the agreement; that complainants had never furnished any monthly statements to defendants of cotton compressed; that in June, 1876, all the presses worked in combination, selecting some one press, and sending all their cotton to it; each press received the profits of compressing its cotton, and paid a *pro rata* share of the expenses. Defendants compressed most of the cotton compressed, and some of it was compressed for complainants. Defendants claimed that this cotton was not within the agreement; that if the partnership was not dissolved, the complainants ought to bear their share of the loss sustained by defendants, not only on the extra handling of the cotton, which defendant had compressed on hired presses, but also a proper share of their loss in having their press repaired. N. H. Brown, of Marston, Brown & Co., testified that there was no agreement that defendants, Mayrant & Co., could use one of their presses if theirs broke down; that when they made this claim, he referred them to the written agreement, and

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that the whole contract between the two firms was contained in this written agreement. To the same effect was the testimony of C. A. Marston, of Marston, Brown & Co., who testified that he offered Robert Middleton, of Mayrant & Co., the use of one of their presses, in case the press of Mayrant & Co. broke down, if the latter would pay one-half the rent. This offer was refused. Robert Middleton testified that the privilege of using this press was the inducement to enter into the contract, and that C. A. Marston made an agreement with him that Mayrant & Co. might use it, and when their press broke down, he applied to Marston, Brown & Co. for it, and was refused; he called on Mr. Brown, and found, to his astonishment, that this stipulation was not included in the agreement. The agreement was drawn up by N. H. Brown, of Marston, Brown & Co., by whom it was signed for this firm, and it was signed by C. L. Huger, for Mayrant & Co. Mr. Huger had no personal knowledge of any agreement as to the use of Marston, Brown & Co.'s press by Mayrant & Co. There was a decree of reference to the register to state the account between the parties, directing him to ascertain how many bales in excess of 50,000 each firm had compressed under the agreement, and charge each firm with the profit realized on such excess, as agreed on in the contract, and, then, after having divided the whole sum between the two firms, to report which firm was indebted to the other, and how much. The register reported that defendants owed complainants \$3,795.42, and among the items of charges against Mayrant & Co. he included shipping charges, at 25c. per bale on all the cotton compressed by Mayrant & Co. To this, defendants excepted, on the ground that he should have charged him with only the net profits of the shipping charges. The exception was overruled and a final decree rendered confirming the register's report, which fixed the balance due complainants at \$3,795.42, and awarding execution therefor. This decree is assigned as error.

P. HAMILTON, and E. S. DARGAN, for appellants.—While a written contract can not be contradicted or varied by parol testimony, it is universally admitted that it may be read in view of the subject matter and the attendant circumstances, in order to understand more perfectly the meaning and intent of the parties.—1 Gr. Ev. § 277; 101 U. States, 271. Facts and circumstances as to the relation of the parties, the nature, condition, and quality of the property, which constitutes the subject matter of the contract may be proven.—PER SHAW, C. J., 2 Cush. 271.

All the facts and circumstances of the transaction, out  
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of which the contract arose, may be shown for the purpose of applying the subject matter and removing or explaining any ambiguity.—100 Mass. 63; 101 U. S. 631. So defendants in this case ought not to be held liable for the cotton compressed for them by presses other than their own, nor held to pay the shipping charges on all the cotton compressed by them. The contract was made by parties actually engaged in compressing cotton, and it included only the cotton compressed by them, and not that compressed for them by other parties; indeed, a condition of things arose after the making of the contract, by the breaking down of defendants' press, which was not foreseen, and the consequences of which could not be equitably charged against appellants. The charge of 40 cents per bale was to meet the expense which it was then known to be necessary to meet, and when other expenses became necessary, through the failure of defendants' press, equity should allow it to them. Even when one partner is to bear no share of the losses as between themselves, the contract means "net profits," and the losses are first to be deducted from the gross profits.—Story on Part. §§ 16, 17, 18, 19, 20, 21, 22, 23; 2 Meeson & Welsby, 357. The decree of the Chancellor should have allowed defendants credit for the losses sustained by them for extra expense in having cotton compressed by other presses. They should have credit also for the cost of repairing their press, as well as other losses, before they could be held liable to complainants for any amount.

OVERALL & BESTOR, for appellee. (No brief on file).

STONE, J.—It is contended for appellant that the written contract signed by the two firms, bearing date November 22d, 1875, does not express the whole agreement, but that there was an additional stipulation by Marston, Brown & Co., to allow R. W. Mayrant & Co. to use an idle compress controlled by the former, in the event that the latter broke down, or got out of working order. We think this position untenable, for two reasons: First, the proof fails to convince us there was such agreement; second, where parties reduce their contract to writing, all prior negotiations not carried into the writing, are presumed to be abandoned.—*Winston v. Browning*, 61 Ala. 80; 1 Brick. Dig. 865, §§ 866-7-8.

The agreement, out of which the present controversy grew, does not constitute the two firms partners *inter sese*. Neither firm is to share in any expenses or losses incurred or sustained by the other. To constitute a partnership between themselves, parties must stipulate for a community of risks,



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as well as a partition of gains.—*Smith v. Garth*, 32 Ala. 368; *Meaher v. Cox*, 37 Ala. 201. Under the contract in this case, neither contracting party is bound to contribute anything to the expenses or losses of the other. Neither was bound to aid the other in the performance of any work their several patrons might intrust to them. They only agreed to divide equally the profits of their several establishments, after setting apart to each the profits of compressing an agreed number of bales of cotton, to cover the expense of the season's work, and forty cents a bale for all cotton each might compress above that agreed number, to cover expense of handling. So clearly did the parties contemplate keeping their business separate, that they inserted this clause in their agreement: "The business of our respective firms to be conducted entirely separate in all respects." Good faith, and the implications of this contract, required that each firm should exert itself for the promotion of the general interest—that neither should obstruct or embarrass the other in the conduct of its business; but neither was bound to render to the other any active assistance in the performance of any contract, or to supply any machinery for the purpose.

It is objected that the Chancellor should have instructed the register to bring into his account only the net sum of the shipping charges, and not the gross sum. There is a want of evidence in the record to support this objection, even if under the terms of the contract it could be entertained. If there was any expense incurred by the compress company in the matter of shipping the cotton, it is not shown. And the language of the contract seems to include both the shipping and compressing, in the clause which allows forty cents per bale, "for the expense of labor and handling cotton."

We find no error in the record, and the decree of the Chancery Court is affirmed, with damages.

## Pyron et al. v. Lemon.

*Bill in Equity by Creditor to set aside Deed as Fraudulent.*

1. *Insolvent debtor; what evidence will not uphold conveyance by, to his children.* When an insolvent debtor conveys land to his sons about the time they reach their majority, the deed can not be upheld on the evidence of the sons, who are without visible means, and who testify that the land was paid for in labor and services rendered by them, without stating the kind of labor, or its value, by the month or year.

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## APPEAL from Pike Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in chancery, filed by A. Lemon, against Marcus, James, and W. M. Pyron. The bill alleged that the complainant recovered a judgment against W. M. Pyron in the courts of Georgia, on which execution was regularly issued; that all the parties were, at that time, citizens of Georgia; that while this judgment was in full force and unreversed, Pyron, who had no property out of which the judgment could be collected in Georgia, purchased a tract of land (describing it) in Pike county, Alabama, and took a deed to it in the name of his wife; that W. M. Pyron and wife made a deed to this land to his two sons, about the time they became of lawful age, and shortly afterwards came to Alabama, and entered into possession of it; that this deed was voluntary, and made with intent to hinder, delay and defraud said W. M. Pyron's creditors, and to put said land beyond their reach; that in 1871, Marcus and James Pyron sold said land to W. R., and W. A. Head, giving the latter a bond to make titles thereto on payment of the purchase-money, and representing to them that the debt due complainant by W. M. Pyron, and all the said Pyron's financial troubles had been settled; that "said Heads were misled by these representations, and had been notified of complainant's claim against the land." The bill prayed that an account be taken to ascertain the amount unpaid on the land, and that it be decreed to complainant, and the land sold for its payment. The answer denied the recovery of the judgment against W. M. Pyron; admitted that he owned no property in Georgia, and averred that Marcus and James M. Pyron bought the lands and went into possession of them more than ten years before the bill was filed; that W. M. Pyron occupied them as the tenant of Marcus and James M. Pyron; admitted the sale to W. R. and W. A. Head, but denied that they made any misrepresentation to them; denied all charges of fraud. The evidence for the complainant showed that he recovered a judgment in the County Court of Henry county, Georgia, a court of record, against W. M. Pyron; that said Pyron was greatly embarrassed financially, and that James and Marcus could not have bought land worth two thousand dollars at the time of the alleged sale to them by their father, W. M. Pyron; that they lived with him and constituted part of his family; that the sons brought the property of the father from Georgia to Alabama, and the latter soon followed, leaving numerous debts unpaid; that Marcus and James Pyron said their father intended to make deeds to the land, conveying it to them, to prevent his cred-

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itors from getting it ; that he did not intend to pay his creditors ; that W. M. Pyron said he left Georgia because he had exhausted all his property there, and was "being crowded by debts ;" that Marcus and James Pyron did not set up any claim to the lands described in the bill until the sale to W. R. and W. A. Head occurred. The testimony of the defendants was to the effect that J. M. and M. A. Pyron bought the property in controversy from W. M. Pyron for \$2,000, executing their notes for it, which they paid in labor and services rendered to W. M. Pyron at his saw mill in Chilton county, Ala., for the years 1870, 1871 and 1872 ; that the sale and purchase was made in good faith, without any intention of hindering or defrauding any of the creditors of W. M. Pyron ; that the land was worth \$1,500, at the time it was sold to W. R. and W. A. Head for that amount. The complainant also proved the regularity of the proceedings on which the judgment was founded by the statutes of Georgia, which are set out *in extenso* in the record, but which need not be inserted here. The Chancellor declared the complainant entitled to subject the balance due by the Heads to the payment of the debt due him, and afterwards ascertained the amount due to him from W. M. Pyron, and from W. A. and W. R. Head to James M. and Marcus A. Pyron, and directed this last sum of money to be paid to the register, and by him paid to the complainant, and if default should be made in payment, that the land be sold to pay it. This decree is assigned as error.

J. M. FALKNER, and R. M. WILLIAMSON, for appellants. (No brief on file).

PARKS & HUBBARD, for appellee.

STONE, J.—The Chancellor found, as a fact, that the deed of conveyance made by Wm. M. Pyron and wife, to his two sons, was fraudulent as against his existing creditors. We are not clearly convinced that in this he erred. On the contrary, we think the weight of the evidence is decidedly against the *bona fides* of the deed. When an insolvent debtor, as Wm. M. Pyron is shown to have been, conveys a tract of land to his two sons, about the time they attain to lawful age, and who are without visible means, and constitute a part of his family, it requires much clearer evidence of payment of the purchase-money, to uphold the transaction, than is found in this record. But this case is much stronger in its circumstances. The only evidence of a consideration paid is the testimony of the two sons, who testify separately, that they paid for the land—two thousand dollars—in labor



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for the said Wm. M., from the year 1870 to the year 1872, inclusive; and each testifies in substantially the same language. On cross-examination each testifies, "that the land was paid for in labor and services rendered by me and [the other brother] as stated in my answer to the third direct interrogatory, and I can give no other or further description of the payments than that already referred to." Not a word said about the price per month, or year, of their services, nor whether they worked as mechanics, or common laborers. There is much other testimony tending to impeach the *bona fides* of this transaction. It can not be upheld.—*Harrell v. Mitchell*, 61 Ala. 270.

The regularity of the recovery and judgment on which this proceeding is founded, is fully shown in the statutes of Georgia, copied in the record.

Affirmed.

## Ware, Murphy & Co. v. Morgan & Duncan.

### *Action on Promissory Note.*

1. *Oral evidence, of contents of writing; when not admissible.*—When a writing, if produced, would not be evidence of the fact to which it relates, parol or oral evidence of such fact will be received.

2. *Same; received when writing beyond jurisdiction of court.*—A witness may testify as to the contents of a paper, which is shown to be beyond the jurisdiction of the court, and which the party relying upon it cannot produce.

3. *General objection to evidence, part of which is admissible; properly refused.* Objections to evidence, a part of which is admissible, and a part inadmissible, may, for that reason, be properly overruled.

4. *Opinion; statement by witness that he had no interest in subject matter of suit, is not.*—A witness can only testify as to facts which come within his personal knowledge; but a statement that he had no interest in the subject matter of the suit, and derived no benefit from it, is not objectionable as matter of opinion.

5. *Agent; may testify that he made full and honest disclosure of authority.* The defendant, after he has stated all that passed between him and the plaintiff, may testify that he made a full and honest disclosure to him as to the extent of his authority to act as agent in the transaction on which the suit is founded; such a statement is equivalent to saying that he communicated all the facts within his knowledge to the plaintiff.

6. *Promise to pay debt of another; when cannot be enforced.*—A promise, verbal or written, to pay the debt of another not founded on a precedent liability, or a new consideration, is gratuitous and cannot be enforced.

7. *Agent; when his contracts do, and when they do not bind the principal.* When a duly constituted agent contracts in the name of his principal, and does not exceed his authority, the principal is bound thereby; and, although the contract was unauthorized by the principal, if the agent was guilty of no

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wrong and made a full and honest disclosure of the extent of his authority to the person with whom he was dealing, and who has all the information the agent possesses of his agency, there can be no liability resting on the agent.

8. *Note; maker of may insist that it was given without consideration.*—The giving of a note, and making repeated promises to pay it, do not prevent the debtor from insisting that there was no consideration for the note, unless a new consideration had intervened, or the promise had induced some action on the part of the plaintiff, from which injury to him would follow.

9. *Controversy; when existence of, sufficient consideration for compromise.* The mere existence of a controversy, which has not assumed the form of a pending suit, is not necessarily a sufficient consideration for a contract of compromise; the controversy must have been *bona fide*, and based on reasonable grounds; the promise to pay a mere unfounded claim which one is induced to make by threats of litigation, is without consideration, and as incapable of enforcement as the original claim, and the jury must pass on the good faith of the plaintiff in the assertion of such a claim, and whether there was reasonable ground for it.

#### APPEAL from Talladega Circuit Court.

Tried before Hon. JOHN HENDERSON.

This action was brought on a promissory note for \$1,040, made on November 15th, 1870, by the appellees, Morgan & Duncan, and payable to the appellants, Ware, Murphy & Co. On the trial, the plaintiffs, Ware, Murphy & Co., read this note in evidence, and the defendants introduced A. W. Duncan, a member of the firm of Morgan & Duncan, as a witness, who testified that, during 1869 and 1870, said firm was engaged in business at Selma, Alabama; that their business was trading in cotton; that witness spent the winter of 1869 and 1870 in New York city, and while there received a letter from Thomas W. Street, in which it was stated that Ware, Murphy & Co. had bought for said Street one hundred bales of cotton for future delivery, which had been sold at considerable loss to him; that Ware, Murphy & Co. had agreed that if he (Street) would advance \$500 as a margin, they would buy another hundred bales of cotton for him for future delivery, and accompanying this letter was exchange for \$500. Plaintiffs objected to any evidence of the contents of this letter, or of any statement as to the exchange, because there was no proof of their genuineness, and because none of the papers were produced, or their absence accounted for. The objection was overruled, and the plaintiffs excepted. Duncan further testified that, in said letter, Street requested him to act as his agent and use his best judgment in the purchase and sale of said cotton; that he showed this letter to Ware, Murphy & Co., and turned over to them the exchange for \$500; that they purchased for Street a hundred bales of cotton, which was sold for a profit; that when the contract was due, H. H. Ware, a member of the firm of Ware, Murphy & Co., informed witness that the cotton was ready for delivery, and inquired of him, as Street's agent, what to do with it;

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that it would cost something to receive and store it, and said something about extending the contract or buying another hundred bales of cotton. The witness then expressed doubt as to whether he had authority to do so, as Street's agent, his only authority being contained in the letter which he had shown to Ware, Murphy & Co. Ware then said he thought Duncan had authority to authorize Ware, Murphy & Co. to make another purchase, and witness then told him if he thought so he could make another purchase; that Ware, Murphy & Co. did so and informed Street of the fact, who wrote to them repudiating the transaction, and what the witness had done, and denied his authority to make another purchase of cotton for him; that this last purchase resulted in a considerable loss, and the following winter, said Ware called on witness in Selma and requested him to give the note, which is the foundation of the suit. Defendants' counsel asked the witness if at, or before, the time he instructed Ware, Murphy & Co. to make the last purchase of cotton he made to them a full and honest disclosure as to the extent of his authority to act for Street. The plaintiffs objected to this question, but the court overruled the objection, and plaintiffs excepted. The witness said he had made a full and honest disclosure of the extent of his authority to act for Street, to Ware, Murphy & Co. Plaintiffs also objected to this answer, but the objection was overruled, and plaintiffs excepted. Defendants' counsel asked the witness whether Morgan & Duncan were interested in any way, or were to derive any benefit from the last purchase of cotton. Plaintiffs objected to this question, but the court overruled the objection, and plaintiffs excepted. The witness answered that Morgan & Duncan were not interested in the purchase of the cotton, and were not to derive any benefit from it. The plaintiffs objected to this answer as evidence, but the court overruled the objection, and plaintiffs excepted. The plaintiffs then offered in evidence several letters, addressed to them by Morgan & Duncan, in which they offered and promised to pay the amount for which suit was brought. Thomas Street, who was also examined as a witness, testified that he had purchased a hundred bales of cotton for future delivery, through Ware, Murphy & Co., which had resulted in a loss to him; that he was dissatisfied because they had closed out his contract without his consent, and wrote them to that effect; that they then wrote him that if he would send them \$500, they would buy another hundred bales of cotton for him; that he procured a draft for that amount, which was accepted by Morgan & Duncan, and sent it to A. W. Duncan in New York; that this contract resulted in considerable



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profit to him ; that he repudiated the purchase of the last hundred bales by Ware, Murphy & Co., made on the instructions of Duncan ; that Duncan wanted him to pay one-half of the loss and became angry with him because he refused to do so ; that Duncan was not authorized to make the second purchase of the cotton, and transcended his authority in doing so. The court charged the jury as follows : "That if they believed from the evidence that the defendant Duncan, as a member of the firm of Morgan & Duncan, made a full disclosure to the plaintiffs of his authority to represent Thomas W. Street, in the purchase of the hundred bales of cotton, and that in making the purchase the plaintiffs acted on their own judgment as to the extent of Duncan's authority to bind Street, then the jury should find for the defendants, although they may be satisfied, by the evidence, that the defendant Duncan was mistaken in the extent of his authority." To this charge the plaintiffs duly excepted. The plaintiffs asked the court, in writing, to charge the jury "that if they were satisfied, by the evidence, that the note sued on was given voluntarily, without fraud or mistake, in compromise of a controverted claim and with full knowledge of all the facts and circumstances connected with the claim, then the jury should find for the plaintiffs." The court refused to give this charge, and the plaintiffs excepted. At the request of the defendants, the court charged the jury : 1. If you believe, from the evidence, that A. W. Duncan bought from, or through, Ware, Murphy & Co., in New York, one hundred bales of cotton for future delivery, on which transaction there was a loss, for which the note was given, and that in doing so the said Duncan acted as agent for Street and not for himself, and not for Morgan & Duncan, and that the said Duncan had been instructed and authorized to do so by said Street, and that the act of Duncan was within the scope of his authority from Street, and that Ware, Murphy & Co. dealt with Duncan as agent for Street, and not otherwise, and with knowledge of the extent of Duncan's authority from Street, then, although Duncan did give the note of Morgan & Duncan to secure the payment of said loss, said note is not binding on him, or the defendants. 2. If the jury believe, from the evidence, that Duncan acted under an honest belief that he had authority from Street to make the purchase which resulted in loss to the plaintiffs, and had honestly and fully made known to the plaintiffs the extent of his authority, and that the plaintiffs dealt with Duncan in said matters solely as agent for Street, and treated the transaction as one between themselves and Street, then the loss, so resulting, is chargeable to the plaintiffs and not to the defendants, and

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this state of the case could not be altered by merely giving the note in controversy on account of said loss, and a subsequent promise by the defendants, or either of them, to pay said note. 3. Although Duncan may have written letters to the plaintiffs admitting liability to them, as shown, it does not follow that he can not show by other evidence, that in truth and in fact he was not so liable. The plaintiffs excepted to each of these charges as they were given. There was a verdict for the defendants. The errors assigned are the rulings on the evidence, and the charges given, and refused.

JOHN T. HEFLIN, for appellant.—The court erred in allowing Duncan to testify as to the contents of the letter written to him by Street, and as to the exchange. The writings were the best evidence, and they should have been produced, or their absence accounted for.—*Kidd & Co. v. Cromwell, Wright & Co.*, 17 Ala. 648; *P. & M. Bank v. Willis & Co.*, 5 Ala. 783. The question asked this witness, “whether before instructing Ware, Murphy & Co. to purchase the cotton, he made a full and honest disclosure to them of the extent of his authority to act for Street,” was improper, substituting, as it did, the witness for the court and jury, and the answer to it merely gave the opinion and belief of the witness as to the character of his disclosure to the plaintiffs.—*Andrews & Bro. v. Jones*, 10 Ala. 460; *Jones v. Donnell*, 13 Ala. 511; *Johnson v. Bellew*, 2 Port. 29; *Bullock v. Wilson*, 5 Port. 338. The note was given in compromise of controverted claims, which is a good consideration, and the charge of the court, given *ex mero motu*, was erroneous because it ignored this fact, and withdrew it from the jury. It is wrong also in stating that a mistake made by the defendant Duncan, if honestly made, may be visited on the plaintiffs. If the note was executed voluntarily, in compromise of a controverted claim, in the absence of fraud or mistake of facts, and with full knowledge of the facts connected with the claim, the plaintiffs were entitled to recover, and the court should have given the charge requested by them.—*Chit. on Con.* 44; 2 *John. Ch. R.* 39. The first charge, given at the request of the defendants, is abstract and misleading; the second charge is liable to the same objections; and the third charge is argumentative, and invades the province of the jury.

TAUL BRADFORD, for appellee.

BRICKELL, C. J.—1. In the course of his examination in chief, the witness Duncan stated that while in New York he received a letter from Street, the contents of which he stated,

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and in which was enclosed exchange for five hundred dollars, to be turned over to the plaintiffs, Ware, Murphy & Co. The plaintiffs objected to the statement because there was no evidence of the genuineness of the letter or of the exchange, neither of which were produced, or an account given for their absence. One of the facts intended to be shown by this evidence was the payment to the plaintiffs by Street of five hundred dollars on account of the purchase of the cotton for future delivery, the losses on which forms the consideration of the note on which the suit is founded. The fact is as capable of proof by oral as written evidence, and of it, without the aid of oral evidence, the exchange, if produced, would be insufficient. The rule is, that where a writing, if produced, would not be evidence of the fact to which it relates, parol or oral evidence of the fact will be received.—1 Brick. Dig. 848, § 631. Besides, it is evident, if the exchange is in existence, that it was in New York without the jurisdiction of the court and not within the power of the defendants to produce. 1 Whart. Ev. § 130. As to the bill of exchange the evidence was unobjectionable. It may be conceded that if it was intended by proof of the contents of the letter to show the agency of Duncan, and the extent of his authority, that the evidence was inadmissible. The concession would not aid the appellants, for the objection made by them was to the whole evidence—that which was admissible and that which was inadmissible, and could for that reason have been properly overruled.—1 Brick. Dig. 886, § 1186.

2. The witness Duncan, on his examination in chief, having stated at length all that had passed between him and the plaintiffs in reference to his authority to act for Street, and the purchase of the cotton, was permitted to state that he made a full and honest disclosure as to the extent of his authority, and that he and his partner, Morgan, were not in any way interested or to derive any benefit from the purchase of the cotton. This was objected to, as an expression, not of facts, but of the conclusions of the witness. The general rule invoked by the appellants, that a witness must testify only to facts, and such as fall within his knowledge, can not be doubted. Whether Morgan and Duncan had any interest in, or were to derive any benefit from, the purchase of the cotton, was a fact and not matter of opinion, or a conclusion from fact, unless every matter which may involve a combination of facts is to be termed matter of opinion or conclusion.—*Massey v. Walker*, 10 Ala. 288. Nor do we think it was exceptionable, after having stated, fully, all that had passed between him and the plaintiffs, for Duncan to state that he had made a *full and honest disclosure as to the extent of*



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*his authority.* It was no more than the statement that the facts he communicated were all within his knowledge.

3. The defense seems to have been rested wholly on the ground that the note was given for the debt of Street, for which Morgan & Duncan were not liable, and that it was therefore without consideration. A promise, verbal or written, to pay the debt of another, not founded on a precedent liability, or a new consideration, is gratuitous, and can not be enforced.—*Underwood v. Lovelace*, 61 Ala. 155; *Beal v. Ridgeway*, 18 Ala. 117. Whether there was a precedent liability resting on either Morgan or Duncan, or on them as partners, to pay the debt, depended upon whether Duncan was without authority, or had exceeded the authority given him by Street, in the transactions with the plaintiffs in reference to the purchase of the cotton. *Second*, if there was an excess of authority, whether the plaintiffs did not deal with Duncan with full knowledge of it, and solely on the credit of Street. The several instructions given the jury by the Circuit Court, to which exceptions were reserved, are directed to this phase of the case.

4. So far as the instructions announce that there was no liability resting on either Duncan or Morgan, for the payment of the debt, if Duncan did not in his dealings with the plaintiffs exceed his authority, the plaintiffs dealing with him as agent, their correctness can not be doubted. "It is a general rule," says Ch. Kent, "standing on strong foundations, and pervading every system of jurisprudence, that when an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent."—2 Kent, 630. The agent having authority, dealing for, and in the name of, the principal, and binding him, there is no ground on which to impose liability upon the agent. If it was imposed, a contract would be made, into which the parties never intended entering.

The instructions proceed further, and assert that if Duncan disclosed to the plaintiffs fully, the nature and extent of his authority to act for Street, and the plaintiffs, upon their own judgment as to the extent of his authority, dealt with him as the agent of Street, there would be no liability resting on either Duncan or Morgan, or on them jointly, if there was mistake as to the authority of Duncan to bind Street. The liability an agent may incur to those with whom he deals in the capacity of agent without, or in excess of authority, rests "upon the supposition, that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act by the principal."

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Story's Agency, § 265. If there was a want of authority in Duncan to venture into the purchase of the cotton for Street, binding him to the hazards of the speculation, there was evidence tending to show that it was as well known to the plaintiffs as to Duncan. That it was the liability of Street which was contracted for by the plaintiffs, and not the liability of Duncan, or Morgan & Duncan. Nor was any ratification of the contract by Street contemplated or intended, and it was not of consequence guaranteed by Duncan. The whole case, on the evidence introduced by the defendant, resolves itself into this simply, that with full knowledge of Duncan's authority, and upon their own judgment as to its extent, the plaintiffs dealt with Duncan. An agent having in fact no authority, and yet assuming to bind his principal, incurs a personal liability. If, with knowledge of the want of authority, he represents himself as leaving it to one ignorant of the facts, and dealing on the faith of the representation, he is guilty of deliberate fraud, and of his liability for the resulting injury there is no doubt. And if not having authority, yet with an honest belief that he has it, he deals with another, he is liable for the resulting injury. The difference in the two classes of cases, is in the degree of moral wrong only, and not in the degree of injury to the other contracting party relying on his representation. The true principle on which the liability of an agent for an authorized contract, rests is, that he has been guilty of a wrong, or omission, depriving the party dealing with him of the benefit of the liability of the principal, for which he contracts.—*Smoot v. Ilbery*, 10 Mees. and Wels. 1. When he is guilty of no wrong or omission, when there is a full and honest disclosure of the nature and extent of his authority; when the party dealing with him has all the knowledge and information which the agent possesses, there is no liability resting on him, though his act or contract proves to be *ultra vires*.—*Jefts v. York*, 10 Cush. 392; *Newman v. Sylvester*, 42 Ind. 106. We do not find any error in the several instructions given by the Circuit Court touching this point. The giving of the note, and promise to pay it, however oft repeated, do not prevent the defendants from insisting upon the want of consideration. Like the note itself they are merely gratuitous, and unless there was a new consideration intervening, or the promise had induced some action on the part of the plaintiffs from which injury to them would follow, there is in them no element of estoppel—*Clemens v. Daggins*, 1 Ala. 622; *Huckabee v. Albritton*, 10 Ala. 657.

5. The instruction requested by the plaintiffs was properly refused, for without explanation, it would have misled, or was calculated to mislead the jury. The mere existence of a con-

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troverſy which has not aſſumed the form of a pending ſuit, is not neceſſarily a ſufficient conſideration for a contract of compromise. The controverſy muſt have been *bona fide*, and there muſt have been ſome reaſonable ground for it. A mere unfounded claim, a party may by the force of threats of litigation be induced to promiſe to pay, or to compromise by the promiſe of payment of a ſum greater or leſs than that demanded ; the promiſe is without conſideration, and as incapable of enforcement as the original claim. There can be no countenance or encouragement given to the aſſertion of claims parties know to be unfounded, or have no good reaſon to believe well founded.—*Proter v. Miller*, 25 Ala. 320 ; *S. C.* 30 Ala. 458. The inſtruction ſhould have referred to the conſideration of the jury, the good faith of the plaintiffs in the aſſertion of the claim againſt Morgan & Duncan, as well as the inquiry whether there was any reaſonable ground for the claim. Without this reference, it was well calculated to miſlead, and was properly reſuſed.

Affirmed.

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### *Contested Application for Letters of Administration.*

1. *Petition for letters of adminiſtration ; not evidence when application for is conteſted.*—On the trial of a conteſted application for letters of adminiſtration, it is error to permit the petitioner to read, as evidence, his own ſworn application for letters.

2. *Record facts ; how proven.*—Record facts can only be proven by the record itſelf, and when other evidence of them is admitted, it is error.

3. *Will ; better practice, when, after application for letters, will propounded.* When, on an application for the grant of letters of adminiſtration, it appears that a paper has been propounded for probate as the laſt will of the deceased, it is the better practice to appoint a ſpecial adminiſtrator to preſerve the aſſets, until the iſſue of *devisavit vel non* is determined.

### APPEAL from Etowah Probate Court.

Heard before Hon. L. E. Hamlin.

On December 1ſt, 1880, John D. Chandler filed his petition in the Probate Court of Etowah county, praying that letters of adminiſtration *de bonis non* be granted to A. P. Thompson, as ſheriff of ſaid county, and *ex-officio* adminiſtrator. This petition averred that Elizabeth G. Jordan, a reſident citizen of Etowah county, died there in 1874, leaving perſonal and real property valued at ſix thouſand dollars ; that in Febru-



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ary, 1876, letters of administration on her estate were granted to T. J. Burgess, as sheriff of said county, and *ex-officio*, administrator; that letters were granted to P. D. Lee, as his successor in office, in May, 1878; that his term of office, as sheriff, had expired, and that A. P. Thompson was the sheriff of said county, and that there was no administrator of the estate of Mrs. Jordan. That the petitioner was a grandson, and heir at law, of Mrs. Jordan, and resided in Marshall county; that before the grant of letters to said Burgess the children of Mrs. Jordan converted to their own use all the personal property of the estate, and claimed the title to, and the possession of, the realty; that at the Spring Term, 1879, of the Etowah Circuit Court, said Lee, as administrator, obtained a judgment against the children of Mrs. Jordan for such conversion, and also recovered the lands; that these causes were taken, by appeal, to the Supreme Court, where one had been affirmed and the other was still pending. This petition was endorsed, "sworn to, and subscribed before me, this, December 7, 1880. L. E. Hamlin, judge of probate." On the 7th of December, 1880, said Chandler called up this petition, and John and D. C. Jordan appeared and contested said petition, and objected to the issuance of letters to A. P. Thompson, as sheriff. They introduced in evidence a petition filed by them on December 1, 1880, which averred that on July 24, 1874, Mrs. Jordan executed her last will, a copy of which was attached to the petition, and that there was no administration on her estate, and the petitioners, who were sons of Mrs. Jordan, prayed that the will might be admitted to probate, and that a grant of special letters be made to them. This petition was not sworn to, but was filed before Chandler's petition was filed. It was proven that J. D. Chandler was a grandson of Mrs. Jordan, and that John and D. C. Jordan were her sons, and were of lawful age. Said Chandler then, by his attorney, offered his petition in evidence, to which the contestants objected, on the ground that it was illegal, and mere hearsay. The court overruled the objection, and permitted the petition to be read in evidence, and considered it in deciding the case. To this ruling of the court the contestants excepted. The court rendered a decree granting letters of administration *de bonis non* to A. P. Thompson, and denied contestants' petition to appoint them administrators. This decree is assigned as error by the contestants.

AIKEN & MARTIN, for appellants.—The court erred in admitting the petition of Chandler in evidence, nor was there any proper evidence that there was any suit in reference to

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the property of this estate pending in the Supreme Court, nor that any case in reference to it had been affirmed by the Supreme Court. The court should have granted special letters of administration.

No counsel marked for appellee.

STONE, J.—The Probate Court erred in allowing the petitioner, Chandler, to read in evidence his own sworn petition. It was, at most, an *ex-parte* affidavit, and not legal evidence, that its averments were true. The facts averred therein, some of them, are record facts, and their existence can only be proved by the record itself. The bill of exceptions states it contains all the evidence on which the probate judge acted, and it does not contain the record of the suit and recovery mentioned in the petition. As we can not know what influence this illegal testimony exerted, in forming the judgment and decision of the judge of probate, we cannot affirm that this ruling was error without injury. This works a reversal of this case.—*Blunt v. Bates*, 40 Ala. 470.

The record shows that appellants had propounded a paper in the Probate Court of Etowah, which they proposed to prove, and establish as the last will of Elizabeth G. Jordan, the right to administer whose estate is the contention in this suit. The paper thus propounded is not found in the present record, and we are not informed what it contains. If its dispositions are different from the law of descents and distributions, and if it be established as a will, then much that has been done, or might take place on the postulate of intestacy, it might become necessary to undo, and administer otherwise. A legally established will becomes the law of descent and distribution governing the particular estate, unless it contravenes some rule of law, or of public policy. If there is a will, and that will be established, then administration granted as of an intestacy, would be irregular and revocable.—*Braugh-tan v. Bradley*, 34 Ala. 694. In cases circumstanced as this was, when ruled on in the Probate Court, the better practice would be to appoint a special administrator to preserve the assets, until the contest, *devisavit vel non*, is determined. The consideration which would control in selecting and appointing an administrator with the will annexed, might be very different from those which would govern, if decedent died intestate.

Reversed and remanded.

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## Conley *et al.* v. Alabama Gold Life Insurance Company.

### *Bill of Interpleader.*

1. *Bill of interpleader; what it should show.*—A bill of interpleader should state distinctly the nature and character of the conflicting claims which are asserted to the debt, duty, or obligation the plaintiff admits rests upon him, and ability and willingness to discharge which, when he may do so safely, he avows; and the parties who prefer the claims, and have the capacity of enforcing them must be brought before the court.

2. *Same; complainant must stand as stake-holder between claimants.*—The complainant in a bill of interpleader must show, to maintain it, that he has no interest in the controversy to be waged between the claimants, is indifferent between them, and stands in the relation of a mere stake-holder, or depository.

3. *Same; cannot be maintained when claims arose by wrongful act of complainant.*—A court of equity will not interfere by bill of interpleader for the relief of one who stands to either of the claimants in the relation of a wrong doer, or who has caused the double claims by his own acts or conduct.

4. *Same; when insurance company can not maintain as to policies.*—An insurance company, which, at the request of the assured, voluntarily cancelled his policies, and issued them anew, changing only the names of the beneficiaries, does not stand indifferent between them; the two sets of policies represent different debts and duties, and in the defeat of one of them the company has such an interest as to prevent it from maintaining a bill of interpleader.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill of interpleader, filed by the Alabama Gold Life Insurance Company against Mary Carnes Conley, Mary Conley Woodruff, and George Woodruff. On the 22d of February Patrick C. Conley insured his life in the Alabama Gold Life Insurance Company for \$2,000, in favor of his wife, Mary Conley. At the time of the death of Mrs. Conley, this policy was in full force. After her death P. C. Conley surrendered this policy, and caused a new one to be issued, payable to John Wylie, as trustee for Mary Conley Woodruff, a niece and heir at law of his deceased wife. Mrs. Conley left no children, and Mary Conley Woodruff and George C. Woodruff were her heirs at law. The policy issued to Wylie bore the same number, the same date, called for the same premium as the original policy, and referred to the same application on which that policy was issued. Patrick C. Conley, in 1873, married the appellant, Mary Carnes Conley, and after his marriage returned this second policy, and caused another



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one to be issued in favor of his second wife, Mrs. M. C. Conley. He then discovered that in his application for the original policy he had misstated his age, and the policy was again returned, and another one issued to Mrs. M. C. Conley, with the age corrected. There was no change in the date of the policy; the number, 180, remained the same; they were all based on the same application, and called for the same premiums, except after the correction of the age of the assured. On the 24th of May, 1872, P. C. Conley procured another on his life from the same company, for \$5,000, in favor of John Wylie, as trustee for Mary C. Woodruff, and after his marriage to Mary Carnes Conley, he also returned this policy to the company and caused another one to be issued in favor of his wife. On the 24th of May, 1874, he failed to pay the premium, and on the 26th of May, 1874, he returned this policy and demanded the issue of another in favor of his wife, M. Carnes Conley, which was issued on payment of the premium. This policy was also returned for correction of the age of the assured. These policies were all numbered 2763, were all dated May 24, 1872, and called for the same premiums. It was based on the original application for the issue of policy number 180, and no medical examination was made after the issue of the latter policy. At the time these changes were made in the names of the beneficiaries of the policies the secretary of the insurance company informed P. C. Conley that they were made subject to the laws of the land. Patrick C. Conley died on the 24th day of July, 1879, and Mary Carnes Conley filed proofs of his death, and claimed the proceeds of the policies. The insurance company refused to pay her, and thereupon she brought suit against it in the City Court of Mobile, to recover the amount of the policies. On December 11th, 1879, Messrs. J. L. & G. L. Smith sent a notice, in writing, to the company that, "on the request of Mr. George F. Moore, the attorney for G. C. Woodruff, you are notified that said Geo. C. Woodruff claims one-half the amount due on policy numbered 180, issued in favor of Mary Conley in 1869. \* \* \* If you pay otherwise than according to this demand you will do so at your peril, and that you may act advisedly we take the liberty of referring you to the decision in the case of *Chapin v. Fellows*, 36 Connecticut, 132." The company, thereupon, filed this bill of interpleader, making said Mary Carnes Conley, John Wylie, as trustee, Mary Conley Woodruff, and George C. Woodruff, parties defendant. Mary Carnes Conley demurred to the bill, on the ground: 1. That the bill shows that if there was any interest adverse to the claim of the defendant, Mary Carnes Conley, then complainant was a

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wrong-doer to those claiming such adverse interest, and a bill of interpleader can not be sustained. 2. Because the bill shows that the complainant made the changes in the policies with full notice of the facts. 3. Because by issuing a policy to Mary Carnes Conley, the complainant incurred a separate liability to her, and in such cases a bill of interpleader will not be sustained. This demurrer was overruled. There was no answer of demurrer filed by G. C. Woodruff. There was an answer filed by the trustee, John Wylie, and by Hannis Taylor, Esq., who had been appointed her guardian *ad litem* for Mary Conley Woodruff, in which she claimed the proceeds of policy number 2763, and one-half of number 180. The Chancellor rendered a decree directing that the parties should interplead, and also directed the money arising from the policies to be paid into court. This decree, and also that overruling the demurrer, are assigned as error.

BOYLES, FAITH & CLOUD, for appellant.—(No brief on file.)

OVERALL & BESTOR, for the Life Insurance Company.—The rights of the parties grow out of a contract in this case, and the cases relating to the inability of a wrong-doer to sustain a bill of interpleader are founded on some trespass or conversion of property. The *fund* is the matter in controversy here. The policies were originally payable to other parties than Mary Carnes Conley, but she now has them and claims the whole amount of them. The question then arises, did the assured, P. C. Conley, have a right to change the beneficiaries? The following authorities hold, that when the contract of insurance becomes consummated, it becomes a vested right between the beneficiary and the company, provided there has been no lapse, and issue of a new policy.—*Chapin v. Fellows*, 36 Conn. 132; *Gould v. Emerson*, 99 Mass. 154; *Fraternal Life Ins. Co. v. Applegate*, 7 Ohio State, 292; *Potter v. Spillman*, 117 Mass. 322; *Fortescue v. Barnett*, 3 Milne & Keene, 36; Bliss on Ins. §§ 339, 340; May on Ins. § 392; 5 Ins. Journal. 307; 4 Central Law Journal, 347.

There was then some doubt, in point of fact, to which claimant the debt or duty belongs, so that the complainant could not safely pay or render it to one, without risk of being made liable to the same duty or debt, by the other.—8 Paige, 347; 4 Paige, 392. The insurance company is not interested in the question as to whom the fund belongs, but is a mere stake-holder, and the specific fund in controversy is not affected by the fact that the insurance company changed the names of the beneficiaries in the policies, at the request of

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the assured, or by any question as to whether the company acted negligently or wrongfully in doing so.—*Salisbury Mills v. Townsend*, 109 Mass. 115. If there could exist any well founded doubt, which we cannot believe, as to the right of complainant to file this bill as a strict interpleader, then there is another class of cases that the facts apply to, which is this: whenever the legal title to property or fund is in dispute, so that complainant cannot ascertain to whom it belongs, he can file a bill in the nature of a bill of interpleader, and get the direction of the court to whom to pay the money, and ask its protection against the claims of both, on complying with the order of the court.—4 Paige, 392-3; 2 Daniel Ch. Prac., note, p. 156v; *Farley v. Blood*, 10 Foster, 360.

HANNIS TAYLOR, for Mary C. Woodruff.

GEO. F. MOORE, and J. L. & G. L. SMITH, for G. C. Woodruff.

BRICKELL, C. J.—A bill of interpleader should state distinctly the nature and character of the conflicting claims which are asserted to the debt, duty, or obligation the plaintiff admits rests upon him, and ability and willingness to discharge which, when he may do so safely, he avows; and the parties preferring such claims having the capacity of enforcing them, must be brought before the court.—2 Dan. Pr. 1560. We shall pass without special comment the omission from the bill of all averment that there is any personal representative of Mary Conley, to whom it is averred the first policy of insurance was payable, and to whom alone, and not to her next of kin, any valid claim to the policy surviving her, would have passed necessarily by operation of law. We shall also pass without any particular comment the failure to aver that Wylie, as trustee of Mary Conley Woodruff, has made or preferred any claim because of the policies which were payable to him. These omissions render the bill demurrable (2 Dan. Ch. Pr. 1560), but they are not made causes of demurrer, and if they had been, could, it may be, have been cured by amendment. There are other grounds of objection to the bill more serious, and fatal to the relief sought, in any aspect of the case.

It is not every case in which a party may be liable to double vexation, or in which, by different or separate interests, two or more persons claim of him the same thing, or the same debt or duty, that a court of equity will come to his assistance, and compel the claimants to interplead. The party must show that he stands not only indifferent between



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the claimants, that he is without interest in the controversy to be waged between them, but it must also appear that he is in the relation of a mere innocent stake-holder, or depository, and that by no act on his part the embarrassment of conflicting claims and the peril of double vexation has been caused. When he stands to either of the parties in the relation of a wrong-doer, or it appears that by his own act or conduct double claims have been caused, he is not innocent, he is not without interest, and the court will not intervene to relieve him from the embarrassment in which he has voluntarily involved himself.—*Shaw v. Coster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229; *Crawshay v. Thornton*, 2 Myln. & Cr. 1; *Desborough v. Harris*, 5 DeG., M. & G. 439; *Cochran v. O'Brien*, 2 Jones & La. T. 380; *Sublichish v. Russell*, 2 L. E. Eq. Cases, 441. If there is any strength in the claim of the appellant, Mary Carnes Conley; if she has any right or interest conflicting with that of the parties to whom the original policies were payable, or if they have claims superior to hers, which are affected by the policies payable to her; if there is embarrassment of conflicting claims, and the insurance company stands in peril of double vexation and double liability for the same debt or duty, it is obvious the embarrassment and peril spring from its own voluntary acts and conduct, and not from the acts and conduct of either of the claimants. The theory underlying the claims of the beneficiaries in the first policies is, that by the policies a perfect voluntary trust was created, irrevocable and indestructible by any act of the insurer or the assured; that the subsequent change of the policies was a wrong, a violation of the trust, and works no forfeiture or deprivation of their rights. The soundness of this theory we do not deem it necessary to discuss. If there be force in it, the insurance company, by making the change in the policies, has given rise to the rival claims upon it, and has committed a wrong against the original beneficiaries. It is not the office of a court of chancery to relieve them from the consequences of the wrong, or the double liability incurred by their erroneous conduct. Nor can it be just that the court should intervene and compel litigation between parties who, it may be, have each valid claims against the company, and no cause of controversy between themselves. It is not possible, in view of the facts alleged, that Conley would have continued the payment of premiums, keeping the policies in life, unless the change in beneficiaries had been made corresponding to his changed relations and duties. Into such payments he was induced by the voluntary act of the company, and by the confidence the company created, that on his death the new policies would

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be paid to the wife, for whose benefit they were taken, and to whom they are payable. It is true, it is averred he was informed the change of beneficiaries was made *subject to the laws of the land*, whatever that may mean. There was no reluctance in making the change, in the acceptance and cancellation of the old policies, and issuing them anew payable to the living wife, to whom he owed the duty of providing sustenance, if she survived him. No greater injury could be done the company, no more serious shock given to its policy holders, than to declare this mode of dealing was without legal efficacy, because of the rights and interests of former beneficiaries, of which the company had full knowledge, and against liability to whom it is now supposed it can protect itself only by a repudiation of the obligation of the new policies. If there be any real peril of double vexation for the same debt or duty; if there are, in fact, conflicting claims, they have their origin and life in the conduct, in the act, of the insurance company, not in the act or conduct of either of the claimants, and it is against their acts, and not its own, the insurance company can ask relief.

The insurance company assumes that the several policies represent the same debt or duty. They are the representatives of different debts and duties created by their own voluntary act, owing to different persons between whom the company does not stand indifferent. If the first policies created a trust which survives the failure and refusal of Conley to pay the premiums, that can not affect the validity of the latter policies, in which Mary C. Conley is the beneficiary, or draw her into a controversy with the claimants under the first policies, or them into a controversy with her, that the insurance company may be relieved from its duty to either. The company has a direct personal interest, according to the averments of the bill, in defeating the claim of one or the other of the defendants, and having that interest, has no right to an interpleader. We will not consider any question touching the validity of these policies.

The demurrer was well taken, and should have been sustained. The decree of the Chancellor is reversed, and a decree here rendered dismissing the bill.

[Street v. Kelly.]

## Street v. Kelly.

*Trover.*

1. *Declaration of party ; not admissible in his favor.* — Declarations of a party, which promote his interests, and are not part of the *res gestae*, or of facts lying within the knowledge of his adversary, and which, if untrue, it is reasonable to presume he would contradict, are not admissible in favor of the declarant, although made to his adversary.

2. *Secondary evidence of written contract ; not admissible until absence of writing accounted for.* — When contracts, on which depend the rights of parties to the suit, are in writing, parol evidence of their contents is not admissible, unless the absence of the written contract, the higher and better evidence, is accounted for properly ; and where such a contract was in court, in possession of the plaintiff's attorney, but had been excluded as evidence because not proven by either of the subscribing witnesses, and no excuse was given for failing to introduce them, it was error to allow parol evidence of its contents.

3. *Cross-examination ; witness not examined as to writing without its production.* — A witness cannot, on cross-examination, be questioned about matters reduced to writing, and subscribed by him, until the writing is produced and shown, or read to him.

APPEAL from Talladega Circuit Court.

Tried before Hon JOHN HENDERSON.

This was an action of trover, brought January 28, 1876, by S. C. Kelly against Andrew J. Street, for the conversion by the latter of six mules, three wagons, &c. The plaintiff testified that he sold the property in controversy to Robbs Bros. on November 14, 1874, and took from them a mortgage, or lien to secure the unpaid purchase-money. A paper was then handed the witness, by counsel, and he identified it as the mortgage referred to, but the defendant objected to the introduction of the mortgage because it was attested by two witnesses, neither of whom were called to prove its execution, and whose absence was not accounted for. The court sustained the objection, and on motion excluded all the statements of the witness as to the contents of the writing. The evidence showed that, prior to November 14, 1874, Kelly owned and had in his possession the property in controversy ; that, on October 27, 1875, this property was in possession of a person who said he was controlling it for the defendant, Street ; that Kelly demanded of Street to know how he came into the possession of his (Kelly's) property, and Street replied that he bought it from Robbs Bros. that witness then said to Street that Robbs Bros. had not carried out their contract with him (Kelly), and that his (Street's) purchase " was



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not worth a cent." The defendant objected to this statement as evidence, but the court overruled the objection, and defendant excepted.

The Robbs Bros. were colliers, and at the time Kelly sold them the property in controversy, they were engaged in manufacturing coal for S. Kelly & Co., who had a written contract with the Alabama Iron Company to deliver 300,000 bushels of coal. The defendant moved to exclude this evidence, because the written contract was higher and better evidence, than the declaration of the witness. The court overruled the motion, and defendant excepted. The plaintiff testified, also, that he was a member of the firm of S. C. Kelly & Co.; that he entered into a contract with the Alabama Iron Company, and it was one of the stipulations of said contract, that if Robbs Bros. failed to carry out the contract between S. C. Kelly & Co., and the Alabama Iron Company, all the property should be held as forfeited. The contract was in writing, and executed at the same time that purchase-money notes made by Robbs Bros. for the property in controversy were given. The defendants moved to exclude this evidence because the witness was speaking of the contents of a written instrument which the court had excluded, and because the contract was higher and better evidence. The court overruled the objection, and defendant excepted. The plaintiff offered the written contract, but the defendant objected to it as evidence because there was no legal proof of its execution. The court sustained this objection and excluded the contract but refused to exclude the evidence of its contents as stated above, and the witness was permitted to state the contents of this written contract for the sale of the property in controversy to Robbs Bros., and under which the plaintiff claimed a lien on the property. The defendant testified that he bought the property in controversy from Robbs Bros., and did not know until afterwards, that Kelly had any claim on the property. On cross-examination, counsel for plaintiff asked the defendant if he did not on 13th of March, 1875, enter into a written contract with E. B. Nelson, and on March 17, 1875, into a written contract with Robbs Bros. These questions were answered in the affirmative. Counsel for plaintiff, reading from a written memorandum which purported to be a copy of the contract with Robbs Bros., asked the defendant "if his contract with Robbs Bros. was not, in substance, as follows ;" the defendant objected to this question, but the court overruled the objection, and defendant excepted. The counsel for plaintiff then made the same inquiry, and in the same manner, as to the contract with Nelson, and the defendant again objected and the court having overruled his objection, he again ex-

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cepted. There was a verdict and judgment for the plaintiffs. The errors assigned are the rulings on the evidence.

TAUL BRADFORD, and BOWDEN & KNOX, for appellant.

JOHN T. HEFLIN, for appellee.

BRICKELL, C. J.—1. The declaration made by the plaintiff to the defendant, that Robbs Brothers had not carried out their contract with him, and defendant's purchase of the property in controversy from them *was not worth a cent*, ought to have been excluded. If relevant, it was only as evidence that Robbs Brothers had broken their contract, and the condition had happened on which, as the plaintiff claims, the property was to be restored to him. Declarations by a party promotive of his own interests, though made to his adversary, not parts of the *res gestæ*, or of facts lying within the knowledge of the adversary, and which, if untrue, it is reasonable to presume he would contradict, are not admissible as evidence in favor of the defendant. It is not through the medium of such declarations that legal evidence of material facts can be constructed.

2. The contract made by Kelly & Co. with the Alabama Iron Company, was shown to have been reduced to writing, for the absence of which no account was given. The writing was the higher and better evidence, and parol evidence of its contents was inadmissible. The contract between the plaintiff and Robbs Brothers was also in writing, and its execution attested by two witnesses. It was in court, in possession of the plaintiff's attorney, but as its execution was not proved by either of the subscribing witnesses, and no excuse was given for failing to introduce them, the court excluded it as evidence, when offered by the plaintiff. It is scarcely necessary to say, that it was error afterwards to receive parol evidence of its contents.—*Street v. Nelson*, 67 Ala.

3. The contracts made by the defendant with Nelson, and with Robbs Brothers, were each in writing, the best evidence of their contents, and there was no reason shown for the introduction of evidence inferior in degree. The evidence of the contents of these writings was not contradictory of any statement made by the defendant as a witness, and their relevancy is not very apparent. As a general rule, on cross-examination, a witness cannot be inquired of as to matters reduced to writing by himself or another, and subscribed by him until the writing is produced and shown or read to him. 1 What. Ev. 268. This rule was violated in the course of the cross-examination the Circuit Court permitted.

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4. The remaining questions which are of importance depend upon the terms and construction of the contract made by Kelly & Co., or Kelly with the Robbs Brothers. That contract is in writing, and until it is produced and in evidence, the questions cannot be fairly decided. There is a manifest impropriety in passing upon them now, on evidence of the contents of the writing, we are constrained to pronounce inadmissible. If in the further course of the litigation they should arise, it may be, the evidence in reference to them will be materially different.

Reversed and remanded.

## Fort's Adm'r v. Davis.

*Bill in Equity by Purchaser, against Heirs and Administrator of Deceased Vendor, for Specific Performance.*

1. *Proof of transactions with deceased person, whose estate is interested in suit; competency of parties as witnesses.*—Under a bill for specific performance, filed by the purchaser against the heirs and personal representative of the deceased vendor, alleging that the notes for the purchase-money were given by the vendor to a son and daughter who had not received equal advancements with his other children, and were paid to them by the complainant after the death of the vendor; such payments are not transactions with the decedent whose estate is interested in the result of the suit (Code, § 3058), and may be proved by the distributees to whom the money was paid, although they are parties to the suit; but a party to the suit, being an heir and distributee, can not testify to statements by the deceased vendor tending to disprove the alleged gift and transfer of the notes, thereby increasing the assets of the estate in which he is interested.

2. *Revision of Chancellor's decree on facts.*—“Giving the legal testimony in this record its proper weight, and treating the chancellor's finding as *prima facie* correct, the court can not clearly see that his judgment is wrong;” and therefore affirms his decree, under the rule laid down in *Rather v. Young* (54 Ala. 94), and other cases cited.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. R. F. LIGON, as special Chancellor, selected by the parties on account of the disqualification of the Hon. N. S. GRAHAM.

The bill in this case was filed on the 2d September, 1878, by R. Tatum Davis, against the heirs, distributees and personal representative of the estate of Joseph J. Fort, deceased; and sought the specific performance of a contract for the purchase of a tract of land by the complainant from said Fort in his life-time, an injunction of an action at law brought by the administrator to recover the land, and a



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divestiture of the legal title out of the heirs. By the terms of the contract between the complainant and said Fort, as shown by the bond for titles, which was dated the 4th November, 1869, and made an exhibit to the bill, the agreed price of the land was \$4,000, which was to be paid in installments of \$1,000 each, on the 1st January, 1871, 1872, 1873, and 1874, respectively; and the bond was conditioned for the conveyance of title on full payment of the several notes given for the purchase-money. The bill alleged that two of these notes were fully paid off and discharged at maturity, and a partial payment was made on the third; that the vendor, being old and in infirm health, afterwards divided and distributed all his property among his children, and, having given more to the other children than to his daughter Mary, who was the wife of the complainant, he gave her the complainant's two unpaid notes, on which the balance due was about \$1,200, and delivered them to her, "upon the further consideration that she would care for and minister to his wants and comfort for his life;" that William Fort, a son of said Joseph J., who had been absent from home, residing in South Carolina, returned soon afterwards, and, "recognizing the fact that he also had not received an equal advancement with the other children, said Joseph J. requested his said daughter Mary to divide with said William the amount due on said unpaid notes; which she agreed to do, upon his promise and agreement to aid and assist in the care and support of their said father." As to the performance of this promise by Mrs. Davis to take care of her father, and as to the payment of the balance due on the notes, the bill contained the following allegations: "Your orator alleges that said Joseph J. Fort was aged and infirm, and required a great deal of care and attention for some time previous to his death, to-wit, for more than two years, but the care and attention of said Mary extended through a period of six years or more; that the said Mary did fulfill, in every respect, the contract made with her father, as an affectionate and loving daughter; and that your orator, in pursuance of said last-mentioned agreement, and the request of said Joseph J. Fort, paid to the said William Fort, after the death of the said Joseph J., one-half of the amount due on said notes, when they were given up to him by said William, to whom they had been handed, at his request, by the said Mary, when they made the agreement in reference to the care and attention to be bestowed by each on their father; and your orator has paid to his said wife the other half of said notes." Possession of the land seems to have been delivered to the complainant, under his contract of purchase, though the fact is not alleged in the bill; nor

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does the bill allege when said Joseph J. Fort died, though it alleges that letters of administration on his estate were granted in July, 1878.

Mrs. Davis, the complainant's wife, was made a defendant to the bill; and she answered, admitting its allegations. William W. Fort was also made a defendant, and a decree *pro confesso* was entered against him. The administrator of Joseph J. Fort answered, denying the material allegations of the bill, as did also several of the adult defendants who were distributees of the estate; and a formal answer was filed by the guardian *ad litem* of the infant defendants, denying the allegations of the bill, and requiring proof. Mrs. Davis and William Fort, whose depositions were taken on behalf of the complainant, testified to the gift and transfer of the notes, substantially as alleged in the bill. The other distributees filed objections to the interrogatories propounded to said William Fort, "calling for any statements by, or transactions with said Joseph J. Fort, deceased," as being within the prohibition of the statute relating to the proof of transactions with a deceased person, or declarations by him, when his estate is interested in the result of the suit (Code, § 3058); and they filed similar objections to the interrogatories propounded to Mrs. Davis, the complainant's wife. The deposition of Camillus Fort, one of the distributees and defendants, was taken on behalf of the defendants; and he testified, principally, as to the advancements made by the decedent to his several children. In answer to one of the interrogatories in chief, this witness farther testified: "In the spring of 1872, I had a conversation with said Joseph J. Fort, about the notes alluded to. He was then at my house, and asked me where his notes against R. T. Davis and his papers were. I told him that W. W. Fort had them. He then asked me, how Billy Fort got them; and I told him, that said Billy Fort got them the last time he was down there. He then told me, that he wanted me to go and get them, and bring them over to my house. That was all that was then said about said notes. R. T. Davis was not present at the time." The complainant objected to the competency of this witness, "because he is a son of said Joseph J. Fort, deceased, whose estate is interested in the result of this suit," but no special objections were filed to any particular interrogatories.

The complainant took the deposition of Virgil A. S. Mounce, the material portions of which are embraced in the following answers: "I was not present when the contract [between the complainant and Joseph J. Fort] was made. I was at the house of said Fort in the fall of 1869, when he remarked, in the presence of complainant, that he had sold the

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lands mentioned to complainant. He said that the notes given for the land were on long time, and without interest; and that all he expected out of said notes was a living. I heard him say, also, that he himself could not divide his property with William W. Fort, because it had passed out of his hands, he reserving a living out of it; that what he had belonged to Mrs. Mary Davis. These notes, given by Davis for purchase of certain lands, was at that time a part of his property. Fort repeated the remark, as to the gift to Mrs. Davis, on several occasions. He told me that he got \$1,000 from said R. T. Davis, to pay for a house and lot in Tuskegee which he had bought; that he had never intended to collect this money from Davis, but was compelled to call on him for it; that all he had reserved to himself, out of the notes, was a living; and I heard him say, also, that Mrs. Davis was to divide the residue of the notes with William W. Fort, after deducting the expenses of his living, &c. He told me repeatedly that he had given Mrs. Davis all he had except a living, and that he wished me to remember it, as there might be trouble." Dr. W. F. Hodnett, whose deposition was taken by the complainant, testified: "In various conversations had with said Joseph J. Fort, from 1865 to 1872, when he died, I heard him repeatedly say that, after giving off and selling his other property, what he had left he intended for his own support during life, and after his death for Mrs. Mary Davis, for taking care of him. The terms were, that Mrs. Davis was to live with him, and take care of him the balance of his life, he being quite old and infirm, and requiring a great deal of attention most of the time; and these terms were faithfully complied with by Mrs. Davis, up to the time of his death."

The cause being submitted for final decree on the pleadings and proof, and on the various objections to evidence, the special chancellor sustained the objections to the testimony of Mrs. Mary Davis, W. W. Fort, and Camillus Fort, "which refers to statements by the deceased, or transactions with him;" but held the complainant entitled to relief on the entire case made by the pleadings and proof, and rendered a decree as prayed by the bill. The appeal is sued out by the administrator and heirs, who here assign as error, that the special chancellor erred in the final decree rendered, "and in holding that the complainant's wife was a competent witness for him."

W. C. BREWER, and J. A. BILBRO, for appellants.



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ABERCROMBIE & GRAHAM, S. B. PAINE, and W. C. McIVER,  
*contra.*

STONE, J.—The testimony is very full, and unquestionably competent, which proves that after the death of Fort, the vendor, Davis, the purchaser, paid to Mrs. Davis and her brother, W. W. Fort, the balance of the purchase-money due on the land. Such payment was in no sense a transaction with the decedent; and under the severest construction we could give to § 3058 of the Code of 1876, both Mrs. Davis and her brother were competent witnesses to prove such payment. The only question, then, on which any contest can arise, is, whether or not the right and ownership of the notes was transferred to his said daughter and son. The testimony of Camillus Fort, claimed to have a bearing on this question, was clearly illegal. Its tendency was to prove that the estate of the older Fort was still entitled to the notes, and thus to create, or increase a fund, in which he would share as a distributee. He is a party to the suit; his testimony related to a statement by the intestate, whose estate was interested in the result of the suit; and if the administrator succeeded in making his defense good, his, the witness' share, would be increased. The question falls directly within § 3058 of the Code.

The special chancellor ruled out all the testimony, offered on either side, of the children of the elder Fort, detailing transactions with, and statements by, intestate. They are all parties to this suit, and he ruled that they fell within the exception expressed in § 3058 of the Code. He granted relief to complainant, however, on the other testimony in the cause. Giving the testimony in this record its proper weight, and treating the Chancellor's finding as *prima facie* correct, we can not see clearly that his judgment is wrong.—*Rather v. Young*, 56 Ala. 94; *Lamar v. Brown*, *Ib.* 157; *Collins v. Loyal*, *Ib.* 403.

We do not think there is any substantial variance between the allegations and proof.—*Bogan v. Daughdrill*, 51 Ala. 312.  
Affirmed.

## Harris v. Swanson & Brother.

### *Action to recover Statutory Penalty for Failure to Enter Satisfaction of Mortgage on Records.*

1. *Release by one of several plaintiffs, or after suit brought.*—A release, executed by one of several plaintiffs, without the assent or authority of the others, does not affect their right of recovery; and when a release is executed after suit brought, it does not “bar the expense of the suit theretofore incurred.”

2. *Entering satisfaction of mortgage on record; transfer before request; admissibility of record of pending suit by assignee.*—When a mortgage has been transferred before request to enter satisfaction on the record, the mortgagee is not liable to the statutory penalty for a failure or refusal to enter satisfaction on request afterwards made (Code, §§ 2222-23); and action being brought against him to recover the penalty, the record of a suit by the assignee against the mortgagor, pending at the commencement of the action, is competent evidence to prove notice of the transfer, if for no other purpose.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAMES E. COBB.

This action was brought to recover the statutory penalty of \$200, for the failure of the defendants, Swanson & Brother, sued as a partnership, to enter satisfaction of a mortgage, on request, and was commenced on the 7th August, 1875. The original complaint was in the name of M. H. Harris; but an amended complaint was filed in September, 1879, in the names of said Harris and John P. Wright, jointly, in these words: “Plaintiffs claim of defendants the sum of two hundred dollars, for that whereas, on the 26th February, 1874, the plaintiffs jointly executed to the defendants a mortgage, the law day of which was October 15th, 1874, and which *was to recover* [was given to secure?] the indebtedness named therein, and on the property therein conveyed; and plaintiffs aver that said defendants filed said mortgage for record, in the office of the probate judge of said county, on the 26th day of February, 1874, and that the same was recorded at their instance, in,” &c.; “and that after the execution of said mortgage, and after the same had been recorded as aforesaid, said defendants received of plaintiffs satisfaction of the amount secured by said mortgage; and that plaintiffs, after defendants had so received satisfaction of said mortgage as aforesaid, to enter satisfaction thereof on the margin of the record of said mortgage; and that said defendants, after being so requested, failed for three months after said payment and request, either

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in person or by attorney, to make such entry, and that they so failed before the beginning of this suit."

The defendants filed eight special pleas, the 6th being in these words: "Plaintiff's said suit ought not to be further maintained, for that since the commencement of said suit, but before issue joined, the plaintiff, John B. Wright, executed and delivered to defendants an instrument in writing, fully discharging and acquitting these defendants of any and all liability to plaintiffs by reason of their alleged failure to enter satisfaction of said mortgage, as complained of by said plaintiffs, and acknowledging payment in full of all claims and demands of said plaintiffs against defendants, by reason of such failure; which release and receipt was intended by the parties thereto as a settlement in full of the matters between them by reason of the defendants' failure to enter satisfaction of said mortgage." The plaintiffs demurred to this plea, assigning the following as grounds of demurrer: "1st, that said plea does not state that there was any consideration for said release and acquittal; 2d, that it does not aver that said instrument of release was executed after said Wright was made a party to this suit; 3d, that it does not aver that said Wright was authorized by Harris to execute said instrument, or to acquit and release defendants; 4th, that said plea shows that said Wright could (?) execute said instrument of release and acquittal." The court overruled this demurrer, and the plaintiff then replied, that the release executed by Wright, if executed at all, was without consideration; to which replication a demurrer being sustained by the court, the plaintiff took issue on said 6th plea with others, and there was a trial by jury.

During the trial, a bill of exceptions was reserved by the plaintiffs, in these words: "Defendants offered in evidence the record of a suit in detinue, which was pending on the 1st February, 1875, at the time notice was given by plaintiffs to defendants to enter satisfaction of said mortgage; in which suit, one W. C. Gholson was plaintiff, and M. H. Harris, one of the plaintiffs in this suit, was defendant. In connection with the offer of said record, and as preliminary thereto, defendants introduced evidence tending to show that said W. C. Gholson was the transferee of Swanson & Brother, the defendants, of the mortgage executed to them, for the alleged failure to satisfy which the plaintiffs now sue, and brought said suit, as such transferee, against said M. H. Harris, to recover a part of the property embraced in the mortgage; and that the question of the satisfaction of said mortgage was involved in said suit. Plaintiffs objected to the introduction of said record, on the following grounds: 1st, that said evi-



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dence was irrelevant; 2d, that the fact that a suit asw pending between said Gholson and Harris, was no matter of defense to this action; 3d, that the pendency of said suit, at the time of notice given to satisfy said mortgage, was no answer to the complaint. The court overruled the objection, and permitted said record to be introduced as evidence; to which ruling plaintiffs excepted."

The rulings of the court on the pleadings, and the admission of the record in evidence, are now assigned as error.

W. C. BREWER, for appellants.

ABERCROMBIE & GRAHAM, *contra*.

STONE, J.—The 6th plea is defective, and the demurrer to it should have been sustained. Wright's release could and did not bar Harris's right of recovery. Moreover, the release being executed long after the action was pending, could not bar the expense of the suit theretofore incurred.—*Harris v. Swanson*, 62 Ala. 299; *Cunningham v. Carpenter*, 10 Ala. 109; *McDougald v. Rutherford*, 30 Ala. 253, and authorities.

The Circuit Court did not err in receiving evidence of the pending suit by Gholson, assignee of the mortgage, brought against Harris before the latter requested Swanson & Brother to enter satisfaction of the mortgage. If the transfer had been made before that request was made, Swanson & Brother had no power or authority to satisfy the mortgage, and failing to do so imposed no penalty on them. The record of that suit, if admissible for nothing else, was competent evidence to prove notice to Harris that the transfer had been made. *Graham v. Newman*, 21 Ala. 497.

Reversed and remanded.

## Renfro & Andrews v. Willis.

### *Trover for Conversion of Horse.*

1. *Complaint against one partner, with summons against partnership, and judgment against "defendants;" amendment of clerical misprision.*—In trover, the summons was against R. & A. as partners, and was returned executed "by leaving a copy with R. and R. & A., defendants;" while the complaint was against R. alone, and he alone pleaded, though R. & A. were named as defendants in the marginal statement of the parties' names in the judgment-entry, which also recited that the parties came by attorney, and the judgment

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on verdict was entered against the *defendants*. Held, on errors assigned by R. and A. each separately, and by R. & A. as partners, that R. alone was sued, and the judgment was against him alone; that the use of the word *defendants*, instead of *defendant*, in the judgment-entry, was a clerical misprision, which was amendable on motion in the court below, and was no ground of reversal; and the judgment was affirmed, on all the assignments of error.

2. *Demurrer; when interposed, and when considered on error.*—This court will not consider the merits of a demurrer to the complaint, when the record shows that it was interposed after a plea to the merits had been filed; nor when the record fails to show that the court below acted on it.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

The action in this case was commenced on the 12th of September, 1878, and was brought by Mary S. Willis as plaintiff. The complaint, as copied in the transcript, was against Forney Renfro as sole defendant, and claimed "of the *defendants* \$500, as damages for the conversion *by them*, on the 28th November, 1875," of a bay mare, the property of the plaintiff. The summons was against "Forney Renfro and Joseph Andrews, partners using the firm name of Renfro & Andrews," and was returned "Executed, this 12th September, 1878, by leaving a copy of the within summons and complaint with Forney Renfro and Renfro & Andrews, defendants." At the ensuing November term, 1878, Forney Renfro appeared, and pleaded not guilty; the name of the case being stated, "*Mary S. Willis v. Forney Renfro, Joseph Andrews.*" At the February term, 1880, a demurrer to the complaint was interposed by said Renfro, on the ground that the property was not described with sufficient certainty, and because there was no sufficient averment of a conversion. This demurrer was filed on the 25th February, 1880, and the case was therein styled "*Mary S. Willis v. Renfro & Andrews.*" On the next day, a judgment was entered in the cause, styling it as before, in these words: "Came the parties, by their attorneys, and the defendant, Forney Renfro, demurred to the plaintiff's complaint; *which demurrer, being considered by the court, is overruled*, and the cause continued *by defendants.*" At the May term, 1880, judgment on verdict was rendered for the plaintiff, as follows: "*Mary S. Willis v. Renfro & Andrews.* Came the parties, by their attorneys, and issue being joined between them, thereupon came a jury," &c., who return a verdict for the plaintiff, assessing her damages at \$71.55. "It is therefore considered by the court, that the plaintiff recover of the *defendants* the sum of \$71.55, for the damages so assessed, and also the costs in this behalf expended; for which let execution issue."

The appeal is sued out by Forney Renfro, Joseph Andrews, and Renfro & Andrews, and errors are assigned by

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each. The errors assigned by Renfro are, the overruling of the demurrer to the complaint, and the judgment rendered. The error assigned by Andrews is, "the rendition of final judgment against him, when he never appeared, and was not served with process." Renfro & Andrews assign as error "the rendition of judgment against said partnership when it was not sued."

JOHN M. CHILTON, for appellants.

H. C. LINDSEY, *contra*.

STONE, J.—The present record is confused in its statements. The complaint is against Forney Renfro alone. The summons is against Forney Renfro and Joseph Andrews, styling them partners using the firm name of Renfro & Andrews. The sheriff returned the process executed "by leaving a copy of the within summons and complaint with Forney Renfro and Renfro & Andrews, defendants." Renfro alone pleaded. The judgment-entry in the margin states the case, "*Mary S. Willis v. Renfro & Andrews*," and recites that the parties came by their attorneys, and renders judgment on verdict against the *defendants*. We feel bound to hold that Renfro alone was sued, for he alone is mentioned in the complaint. Rendering judgment against the defendants, in the plural, was a clerical misprision in the court below, which would have been corrected on motion in that court. It furnishes no ground for reversal, as the judgment, in legal effect, is, and can only be, against the party sued. Execution can go only against Renfro.—*Grayham v. Roberds*, 7 Ala. 719; *Del Barvo v. Br. Bank*, 12 Ala. 238; *Savage v. Walshe*, 26 Ala. 619.

There are two reasons why we can not consider the demurrer. First, it was interposed after a plea to the merits had been filed; and second, it is no where shown that the Circuit Court ruled on the demurrer.—*Gayle v. Smith*, Min. 83; *Bean v. Chapman*, 62 Ala. 55.

Affirmed.



[Hinson v. Brooks.]

## Hinson v. Brooks.

### *Bill in Equity for Account, and Cancellation of Mortgage.*

1. *Injunction of sale under mortgage before account, notwithstanding denials of answer.*—When the bill seeks an injunction of a sale under a mortgage, and an account of the mortgage debt, alleging full payment and satisfaction thereof; while the answer, denying the allegation of payment, speaks doubtfully of the amount due, and admits that the property is worth at least double the balance claimed to be due; the accounts being complicated, and the original parties dead, “the safe rule is, to retain the injunction until the account is taken.”

2. *Waiver of right of revision by appeal.*—When the record shows that, after the overruling of a motion to dissolve the injunction on the denials of the answer, a decretal order of reference of the matters of account was made with the consent of the parties, such consent operates as a waiver of the right to review, by appeal, the order refusing to dissolve the injunction.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 30th November, 1880, by Mrs. Edy Brooks, as the administratrix of the estate of Frank Brooks, deceased, against Joseph L. Hinson; and sought an injunction of a sale of certain lands, under a power contained in a mortgage executed by said Frank Brooks in his life time, an account of the mortgage debt, and general relief. The mortgage, a copy of which was made an exhibit to the bill, was dated 21st September, 1870; was given to secure the payment of three promissory notes, for \$2,500 each, of even date with the mortgage, and falling due on the 20th November, 1870, 1871, and 1872, respectively; and conveyed to the mortgagee, John J. Daniels, certain lands and personal property, particularly described, with power of sale, if default should be made in the payment of the notes at maturity, the notes having been given for the purchase-money of the lands. The bill contained the following averments, as to the payment of the notes, and the transfer of the mortgage to Hinson, the sole defendant to the bill: “Your oratrix shows that the first one of said notes, falling due on the 20th November, 1870, was paid in full to said Daniels at maturity, and was surrendered by him to said Frank Brooks; that the second of said notes also, which fell due on the 20th November, 1871, was fully paid during the life-time of said Frank Brooks, to said Daniels and J. L. Hinson, and was delivered up to said Brooks; and that the remaining note, which

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fell due on the 20th November, 1872, was transferred by said Daniels, on the 21st September, 1872, to said Joseph L. Hinson, who now holds and claims to own said note; and your oratrix avers that said note and mortgage, if anything is due thereon, which she denies, are the property of said Joseph L. Hinson. And your oratrix avers, from information and belief, and from receipts and other written evidences of payments, that said Frank Brooks fully paid and overpaid to said Hinson, in money, and cotton raised on said lands, which were paid and delivered, as your oratrix avers, by said Frank Brooks to said Hinson, to be applied by said Hinson to said last note, and which was so applied by said Frank Brooks, to said last named note in full, with all interest thereon; so that your oratrix avers that said note has been fully paid, and it and said mortgage should be delivered up and cancelled." "Oratrix avers and shows, also, that said lands are worth about from four to five thousand dollars, if not more; and that the claim asserted by said Hinson, of the amount due on said note, is not more than fourteen hundred dollars; and your oratrix says and avers that she is ready with the cash, and offers to pay any balance that may be found due on said note and mortgage on a fair accounting." The bill alleged, also, that said Frank Brooks died in March, 1879, intestate; that Daniels died in the early part of the year 1880, and no letters of administration had ever been granted on his estate; and a sale of the lands under the mortgage, "before a settlement and account are had and taken of the amount, if anything, that is due on said note and mortgage, would greatly embarrass your oratrix, and would do irreparable injury to said estate."

An answer to the bill was filed by the defendant, admitting the execution and transfer of the notes and mortgage as alleged, but denying the averments of payment and satisfaction. As to these matters, the averments of the answer were in these words: "Defendant denies that said note first falling due was paid in full at maturity to said Daniels; and he expressly denies that it was paid at maturity, or that the whole of it was paid to said Daniels. Defendant says that, on information, he admits that a portion of the amount due on said note was paid on the same prior to the 21st September, 1872, when the same, together with the two other notes secured by said mortgage, was transferred by said Daniels to this defendant. There was an amount due on said first note when it was so transferred, but the exact sum is not now remembered by this defendant; in his belief, the amount due on said note at that time was between eight hundred and one thousand dollars. He admits that said note was sur-

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rendered up to said Brooks, and he demands that the same be produced, as well as the second note, for the inspection of the parties. He admits that the second note has been paid, and delivered up to the said Frank Brooks. If anything due on said second note, before the same was transferred to this defendant, was ever paid to said Daniels, it was no more than the interest, or a portion thereof, the amount of which this defendant can not now remember. Defendant admits, as hereinbefore stated, that the remaining note, and the other two notes secured by said mortgage, were transferred to this defendant on the 21st September, 1872, as was also the mortgage; admits that he now holds and claims to own, and does own said note, and it is now his property; denies that nothing is due on said note, and avers that more than fourteen hundred dollars is due thereon. Defendant denies, also, that said Frank Brooks fully paid and overpaid to this defendant said note, in money, cotton raised on said lands or elsewhere, or any other thing delivered by said Brooks, or by any one else for him, to be applied to said note last falling due; and he expressly denies that said last named note, with the interest thereon, has been paid in full, and denies that the same ought to be delivered up and cancelled; and he avers that there is now due on said note at least fifteen hundred dollars, and denies that complainant has any written evidences of the payment of said note in full." The answer alleged, also, that there had been other transactions between the defendant and said Frank Brooks, growing out of advances made to enable the said Brooks to make a crop, and receipts given in connection with these transactions, which were material to a correct understanding of the matters of account between them.

A motion to dissolve the injunction, on the denials of the answer, and on other grounds, was afterwards made by the defendant, but was overruled and refused by the Chancellor; and on the next day, an order was made and entered, "by consent of the parties, that the register take and state an account of the amount due on the mortgage debt." The appeal is sued out from the decree overruling and refusing to dissolve the injunction, and that decree is now assigned as error.

W. R. HOUGHTON, CLEMENTS & TYSON, and R. M. WILLIAMSON, for appellant, cited *Calhoun v. Cozens*, 3 Ala. 498; *Barr v. Collier*, 54 Ala. 39; *Satterfield v. Johns*, 53 Ala. 127; *Sanders v. Cavett*, 38 Ala. 51; *Brooks v. Diaz & Co.*, 35 Ala. 599; *Struve v. Childs*, 63 Ala. 473; 2 Jones on Mortgages, § 1801.



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COOK & ENOCHS, *contra*, cited *Miller v. Bates*, 35 Ala. 580; *Rembert & Hale v. Brown*, 17 Ala. 667; 2 Jones on Mortgages, § 1813.

STONE, J.—The accounts shown in the transaction disclosed in the present bill, are of so complicated a character, and the consequences of a sale, if less is due than is claimed, will probably be so embarrassing, that a dissolution of the injunction would scarcely be justified, on the indefinite denials contained in the answer. In cases like this, where all indebtedness is denied by complainant, and the defendant speaks doubtingly of the amount claimed to be due—the accounts running through many years, and of course complicated—complicated still further by the death of each of the original contracting parties—and the mortgage security being admitted by the defendant to be worth at least double the largest sum claimed, the safe rule is to retain the injunction until the account is taken.

But we need not rest our opinion on the principle stated above. After the decretal order of the Chancellor, refusing to dissolve the injunction, the Chancellor, *with the consent of the parties*, made a decretal order of reference, that the account be taken by the register, and reported on. This must be regarded as a waiver of all right to have this interlocutory order reviewed.

Affirmed; and the cause will proceed in the court below, on the decretal order of reference made by the Chancellor.

## Slaughter v. Doe, *ex dem.* Swift, Murphy & Co.

### *Ejectment by Mortgages.*

1. *Conveyance to partnership.*—A conveyance of lands to a partnership, by its firm name, vests the title, at law, in the several partners as tenants in common.

2. *Objection to evidence admissible under one of several counts or demises.*—In ejectment, where two or more demises are laid in the declaration, evidence which is applicable to one only can not be excluded from the jury, on motion, because inapplicable to the others: its operation and effect should be explained and limited by a request for appropriate instructions.

3. *Plea of general issue, when available.*—The plea of the general issue being limited by statute to cases “where the defendant relies on a denial of the cause of action as set forth by the plaintiff” (Code, § 2988), the defendant in ejectment can not, under the plea of not guilty, prove payment or satisfaction of the mortgage under which the plaintiff claims title.

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4. *Payment of mortgage debt, as defense to action by mortgagee.*—Under a mortgage of chattels, payment of the mortgage debt, before action brought, will defeat a recovery; but, in reference to mortgages of real estate, this court has adopted a different rule, and holds the mortgagee entitled to recover at law, as against the mortgagor and those claiming under him, whenever the mortgage is silent as to his right to take possession, or when the period has expired during which the right of possession is reserved to the mortgagor, and payment of the debt will not defeat a recovery in such action; though “it seems to be settled, that as against all persons, except the mortgagee and those claiming in his right, the legal title is in the mortgagor until foreclosure.”

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

This action was brought to recover the possession of a lot or tract of land, which was described in the declaration as “a certain brick warehouse, and the land on which it stands, in the city of Opelika in said county, known by the name of the ‘Sledge & Smith Warehouse,’” and was commenced on the 10th April, 1879. The declaration was in ejectment, counting on a demise by Charles J. Swift, and on a demise by “George P. Swift, senior, George P. Swift, junior, and Samuel G. Murphy.” The defendant, A. H. Slaughter, appeared, and entered into the usual consent rule, confessing lease, entry, and ouster; and the record does not show that he filed any special plea. On the trial, there was a verdict and judgment for the plaintiff; and a bill of exceptions was reserved by the defendant, in which the facts are thus stated:

“The plaintiffs introduced in evidence a mortgage from James C. Sledge, Sarah J. Sledge, and James J. Smith, in the words and figures following.” (The mortgage, as here set out, which is dated the 26th September, 1871, signed by the three persons named, and attested by two witnesses, conveys the property here sued for, to “Swift, Murphy & Co., of Columbus, Georgia,” and purports to be given to secure the payment of a promissory note for \$2,000, of even date with the mortgage, payable on or before the first day of December next after date, and containing a stipulation in these words: “The above amount may be discharged, by consigning to the said Swift, Murphy & Co., at Columbus, one thousand bales of cotton, on or before the first day of December next, upon which they are to receive the usual commissions and storage.” The mortgage, after reciting that “the foregoing conveyance is in trust, on the conditions and for the purposes hereinafter set out,” states the indebtedness shown by the promissory note, which is set out, and then proceeds thus: “Now, should we, or either of us, pay, or cause to be paid, the said promissory note when the same shall become due, or perform the said condition upon which said note may be discharged, then the foregoing conveyance shall be deemed and considered null and void; but, should we fail

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to pay off or discharge said note, when the same shall become due, in whole or in part, then the foregoing conveyance shall be held and considered as valid and binding," and the mortgagees may take possession and sell.) "The defendant objected to the introduction of said mortgage, under the first count—1st, because of a variance; and, 2d, because the demise in said first count is laid in Charles J. Swift, and the mortgage does not show, or tend to show, title in him. And the defendant objected to the introduction of said mortgage under the second count—1st, because of a variance; 2d, because the demise in said count is laid in George P. Swift, senior, George P. Swift, junior, and Samuel G. Murphy, as partners, whereas, said mortgage is to Swift, Murphy & Co.; and, 3d, because said mortgage is to Swift, Murphy & Co. as trustees, and not as partners. And the defendant objected, also, to the introduction of said mortgage under either count, because the consideration of said mortgage was not shown. The court overruled each of said objections, and the defendant separately excepted to each of said rulings."

The bill of exceptions then sets out the rulings of the court on several questions of evidence, which it is unnecessary to state, since they are not noticed in the opinion of the court, and then proceeds: "The plaintiff then offered in evidence a note for \$2,000, being the note for the payment of which the mortgage was given to secure," setting it out. "The defendant objected to the introduction of said note—1st, because it was irrelevant; 2d, because there was no proof of any consideration for it, or of the non-performance of its condition. The court overruled each objection, and allowed the note to be read to the jury; to which rulings the defendant excepted. The defendant then testified, as a witness for himself, that he was in possession, as the tenant of the Alabama Gold Life Insurance Company, under a contract commencing about the 1st October, 1878, by which he was to pay \$300 per year for the rent of said premises; that, by one of the terms of said contract, he was to place on the building all necessary repairs, and the cost thereof was to be deducted from the rent; that it became necessary, after April, 1879, to make certain repairs on said building, and he did make them; and the witness was then asked the nature and value of said repairs. The plaintiff objected to this question, and the court sustained the objection, and refused to allow the witness to answer; to which ruling of the court the defendant excepted."

"The defendant then offered in evidence the deposition of James J. Smith; to which the plaintiff objected, and the court sustained the objection, and refused to allow said deposition to be read; to which ruling the defendant ex-



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cepted." The material portion of the testimony of this witness is contained in his answer to the third direct interrogatory, in these words: "Sledge & Smith did not receive a monetary consideration at the time said mortgage was given. They borrowed \$6,000 from Swift, Murphy & Co., for which they agreed, in addition to the interest, to ship one thousand bales of cotton to Swift, Murphy & Co.; but, before the maturity of the note given for the \$6,000, Sledge & Smith paid the full amount of the note. The mortgage for \$2,000 was given to secure the shipment of the one thousand bales of cotton; and of course, when the cotton was shipped, it was satisfied." The bill of exceptions then proceeds as follows: "Prior to any evidence in the cause, the defendant suggested that he was in possession as the tenant of the Alabama Gold Life Insurance Company, under a contract for annual renting. It was agreed, on the trial, that the defendant should only be liable for the actual rent due when the action was brought, and such as might accrue under his contract since the suit was brought; and the amount was fixed and agreed on as \$450, and so assessed by the jury. There was proof tending to show that, at the time said mortgage was executed, Sarah J. Sledge was in possession of the premises, claiming them as her own; and this, with said note, was all the proof of title in the plaintiffs, except that it was proved that Mrs. S. J. Sledge had been in possession of said lot for three or four years before the warehouse was built, claiming the same as her own; and that she let Sledge & Smith build the house on the lot, and they were to occupy it a certain time; and that said house was built during the spring of 1871; and that she afterwards remained in the possession of the same after 1874, when Sledge & Smith went out of possession, until 1877, renting the same as her own."

The several rulings of the court to which exceptions were reserved by the defendant, as above stated, with other matters not material, as the case is here presented, are now assigned as error.

JOHN M. CHILTON, and W. J. SAMFORD, for appellant. Slaughter defended as tenant in possession, holding by yearly rental from the Gold Life Insurance Company. The title of his landlord does not appear, and it was not necessary to show it, since the plaintiff must recover on the strength of his own title.—*Brock v. Yongue*, 4 Ala. 584. The defendant had a right to set up any defense which would have been available to his landlord. The plaintiff's only source of title was the mortgage to Swift, Murphy & Co., not as partners, but "as trustees," which was not competent evidence under

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either of the demises laid. That the evidence must support the demise as laid, see 3d Greenl. Ev. § 317. That a conveyance under the firm name would pass only an equitable title, see 2 Brick. Digest, 303, § 55; 21 Ala. 407. The mortgage was not admissible, under either count, for the further reason that no consideration was shown, and the defendant was in no manner connected with it.—*Devendal v. Malone*, 25 Ala. 272. Moreover, the deposition of Smith, which the court excluded under a general objection, shows that the note for \$2,000 was without consideration; and if there was no debt, there could be no valid mortgage; and the plaintiffs are thus allowed to recover the property without having paid any thing for it.

J. M. RUSSELL, T. L. KENNEDY, and W. H. BARNES, *contra*, cited Jones on Mortgages, vol. 1, § 719; *Smith v. Johns*, 8 Gray, Mass. 517; Tyler on Ejectment, 170; *Doe v. Roll*, 7 Ham. 70; Wait's Actions and Defenses, vol. 3, 118.

STONE, J.—The declaration in the present action counts on two demises; one by Charles J. Swift, and the other by George P. Swift, senior, George P. Swift, junior, and Samuel G. Murphy, styling themselves partners using the firm name of Swift, Murphy & Co. At law, a title conveyed to a partnership in its firm name, vests in the several partners as tenants in common.—*Caldwell v. Parmey*, 56 Ala. 405. Testimony was offered by plaintiff, tending to prove title under the latter, but inapplicable to the first named demise. Objection by defendant to the admissibility of the evidence under the first demise. This was not the proper way to raise the question. The testimony—mortgage to Swift, Murphy & Co.—was clearly admissible under the pleadings; and if it became material to limit the operation of the testimony to a part, less than the whole of the issues, that was a proper subject for a charge, explaining to the jury the extent to which it was pertinent.—*Goldsmith v. Picard*, 27 Ala. 142; *Cook v. Parham*, 24 Ala. 21; 1 Brick. Dig. 810, §§ 98, 99.

The testimony of Smith, rejected by the court at the instance of plaintiff, was offered to prove that nothing was due on the mortgage, the foundation of the suit. If this defense could be made at law, there was no issue formed to justify its introduction. The record contains no special plea, setting up that matter in avoidance. Our statute (Code of 1876, § 2988) has defined the extent to which the plea of not guilty can be made available. Its language is: "In all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff, he may plead the general issue;

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and in all other cases, the defendant must briefly plead specially the matter of defense, and may, by leave of the court, plead more pleas than one." The defense offered was not a denial of the cause of action as set forth—the making of the note and mortgage, and their maturity. It proposed to go farther, and avoid their effect by proving payment, or something equivalent thereto.—*Petty v. Dill*, 53 Ala. 641; *Trammell v. Hudson*, 56 Ala. 235; *Folkes v. Collier*, at this term.

There are many decisions of other States, holding that payment of the debt secured, before action brought, is a good defense to an action of ejectment brought by the mortgagee. Some, if not all, of these decisions are influenced, more or less, by statutes defining the nature and extent of recovery in such actions.—*Jackson v. Stackhouse*, 1 Con. 122; *Gray v. Jenks*, 3 Mason, 520; *Gray v. Wass*, 1 Green. 257; *Vase v. Handy*, 2 Greenl. 322; *Burton v. Austin*, 4 Ver. 105; *Petty v. Clarke*, 5 Pet. 481. And the following text-writers assert the same doctrine: 2 Greenl. Ev. § 330; 1 Jones on Mort. § 719; 3 Wait's Act. & Def. 66; 4 *Ib.* 545. See, also, *Breckenridge v. Armsby*, 1 J. J. Mar. 236; S. C. 19 Amer. Dec. 71. This court, however, has adopted a different rule, and holds that, when the mortgage is silent as to the time or event on which the mortgagee may take possession; or, when the time is expressed in the mortgage, during which the mortgagor may remain in possession, and that time has passed; then, as against the mortgagor, and those claiming in his right, the mortgagee has the legal title and right to possession, and may maintain ejectment; and the payment of the mortgage debt is not a good defense to such action, although it will defeat an action for chattels conveyed by mortgage.—*Deshazo v. Lewis*, 5 Stew. & Por. 91; *Lewis v. Canfield*, 2 Ala. 555; *Morrison v. Judge*, 14 Ala. 182; *Harrison v. Hicks*, 1 Par. 423; *Barker v. Bell*, 37 Ala. 354; *Goodman v. Pledger*, 14 Ala. 114; *Shirer v. Johnson*, 62 Ala. 37; *Toomer v. Randolph*, 60 Ala. 356; *Welch v. Phillips*, 54 Ala. 309; *Woodward v. Parsons*, 59 Ala. 625; *Denby v. Mellgrew*, 58 Ala. 147; *Coyle v. Wilkins*, 57 Ala. 108; *Dryer v. Lewis*, 57 Ala. 551; *Baldwin v. Hatchett*, 56 Ala. 461; 2 Wash. Real Prop. 95.

The following authorities bear on the question of usury, when relied on in defense of an action of ejectment by a mortgagee. *Chandler v. Morton*, 5 Greenl. 374; *Richardson v. Field*, 6 *Ib.* 35; *Holton v. Button*, 4 Com. 436.

And it seems to be settled that, as against all persons except the mortgagee, and those claiming in his right, the legal title is in the mortgagor, until foreclosure.—*Knox v. Easton*,



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38 Ala. 345, 356; *Denby v. Mellgrew*, 58 Ala. 147; 3 Wait's Act. & Def. 66; Tyler on Eject. 56; *Hitchcock v. Harrington*, 6 Johns. 290.

Affirmed.

## Preiss v. Parker.

*Bill in Equity to Enjoin Use of Party-wall, without Contribution.*

1. *Party-wall; liability for cost of, as between adjacent proprietors, and injunction against use.*—When a wall is erected by the owner of a lot, on the boundary line between his own and the adjoining lot, resting partly upon each, the law imposes no obligation on the owner of the adjacent lot to contribute to the cost of its erection; nor will a court of equity enjoin him, or a subsequent purchaser, from the use of the wall without making contribution, in the absence of a promise to contribute.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 15th August, 1879, by Mrs. Preiss, against Mrs. T. R. Parker and her husband, James Parker; and sought to enjoin and restrain the defendants from using, in the erection of a brick store on a lot in the city of Montgomery which belonged to Mrs. Parker, a wall which the complainant had built in the erection of a store on the adjoining lot, which belonged to the complainant. The complainant bought her lot from David Benjamin, and received a conveyance from him dated the 15th August, 1877; and she built a brick store-house on said lot during the year 1878. The bill alleged that, on the erection of this house," by an agreement and understanding with DeWitt C. Taylor, who was then the owner in fee of the east half of said lot No. 4, that your oratrix should erect upon the east side of said west half of said lot a party-wall, six inches thereof resting upon the east half of said lot, she built said party-wall as above stated and agreed on." Mrs. Parker afterwards bought the east half of said lot from said D. C. Taylor, his conveyance to her being dated the 30th August, 1878, and containing full covenants of warranty. The bill alleged that Mrs. Parker "has commenced the erection of a brick house on the east half of said lot so purchased by her, and threatens to use the said party-wall as a support for said building, and as a support for the sleepers of said building now in course of erection. Your oratrix has forbidden the use of said party-wall

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by said T. R. Parker, unless she first pays for such use, and has demanded payment for such use of said wall ; and she has failed and refused to pay the same, and is still proceeding to rest the sleepers of said building upon said party-wall, and to use said wall as a support for her said building, without the consent, and against the remonstrance of your oratrix." The bill alleged, also, that the cost of the party-wall was \$460 ; that the defendants owned no property except what belonged to Mrs. Parker's statutory separate estate ; and that the complainant was remediless in the premises, and would lose the value of one-half of the wall, unless the defendants were enjoined as prayed. The prayer of the bill was, that the defendants be enjoined and restrained from the further use of the party-wall, " until your oratrix is paid for such use of said wall," and for general relief.

An amended bill was afterwards filed, alleging that, " at the time your oratrix commenced building said party-wall, the said T. R. Parker knew that said party-wall was being built ; that she was then the equitable owner of said east half of said lot, and knew of, and acquiesced in the building of said wall by your oratrix, with the expectation that one-half of said wall would be paid for by said T. R. Parker, when she should use the same ; and that said defendant recognized her liability to thus pay for one-half of said wall when she should use the same, and promised to pay therefor."

Mrs. Parker answered the bill, admitting the erection of the wall by the complainant, and that it rested partly on the east half of the lot ; denying the alleged agreement with Taylor ; averring that, if any such agreement or promise was made by him, it was verbal only, and was his personal contract, did not pass with the land, nor impose any legal obligation on her ; alleging, also, that she had no notice of such agreement, if any was made, and claiming protection against it as a *bona fide* purchaser for value ; and she demurred to the bill for want of equity, assigning various causes of demurrer. James Parker adopted the answer and demurrer of his co-defendant. No answers were filed to the amended bill, the amendment being allowed and filed when the cause was submitted for final decree.

The depositions of Philip Preiss, who was the complainant's husband, John T. McDonald, and Charles R. Dickinson, were taken on the part of the complainant ; and the deposition of Mrs. Parker herself was the only one taken for the defendants. *Preiss* thus testified, as to the circumstances under which the wall was built, and a subsequent promise by Mrs. Parker to pay a part of the cost : " Complainant, for whom I was acting, built said wall, partly on the east half of

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said lot, in pursuance of an agreement made by me, as her agent, with Jno. T. McDonald, on behalf of said Taylor, which agreement was made in August, 1877. Said building was commenced in July, 1878. At the time Mrs. Parker bought the east half of said lot, said east wall had already been built. At the time she purchased said east half, she knew that said building was being erected; but I don't know whether she knew how it was being built. In August, 1879, when Mrs. Parker was about laying the joists of her building on said east half, she sent for me, and asked me not to prevent the workmen from cutting holes in the wall for the joists; that she would pay me for it, and asked me how much it was worth. I told her \$200. This she refused to pay, but offered \$150. Afterwards she said she would leave it to two bricklayers, who, in case they could not agree, were to call in a third, and that she would pay the amount agreed on by them. I offered to take the lowest amount named by either of said bricklayers, which was \$223, which she refused to pay." McDonald thus testified, in regard to the conversation between Preiss and himself: "Some time prior to January, 1877, I had a conversation with said Preiss in regard to said wall. He wished to erect a party-wall between the east and west halves of said lot. I told him to go ahead—that it would be all right. The authority so given by me to him, to erect said wall partly on the east half of said lot, was verbal; and I acted as the agent of said Taylor in giving such authority."

*Charles R. Dickinson*, who built Mrs. Parker's house under contract with her, thus testified: "In speaking of said building to be erected for her, I told Mrs. Parker that she must be aware there was a party-wall between her and Mrs. Preiss. She said she was, and that it would all be satisfactorily arranged and paid for. She said that she expected to use the party-walls on both sides of her lot, and based her contract with me on such use. She said that she would pay for such use, and, in my contract with her, she indemnified me against loss and damage by any detention occasioned by trouble about said party-walls. While I was building said house for her, she asked me to estimate the value of said east wall of Mrs. Preiss' house. The first estimate I made was about \$223. She afterwards asked me to estimate the value at the rate of sixteen bricks to the foot; which I did, at \$183. . . . When I first began the building, she always said that she would pay for the walls, and that she and Mr. Preiss would make it all right. Afterwards, she said that she would not pay more than \$150. Then she agreed to leave it to three bricklayers, of whom I was one. My estimate being the lowest, Mr. Preiss agreed to take it, but she refused to pay it."



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Mrs. Parker herself thus testified: "The person from whom I bought said lot did not inform me, at any time before said purchase, that there was any contract or agreement, by which the owner of the west half of said lot should build a party-wall, partly resting on the east half of said lot, and that whoever built on said east half should, upon using the said wall, contribute one-half of the cost of the same to the person who built it, nor any other agreement of similar import. I had no knowledge, before said purchase, of any such agreement." [In answer to cross-interrogatories.] I think I bought the east half of said lot before Mrs. Preiss began building said wall. I know I had contracted for the purchase of it, and made a payment on account of it, before she began building; but I am not certain whether I had received my deed from Mr. Taylor, who was in the north, until afterwards. I did state, at or before I commenced building on my lot, to Mr. Charles R. Dickinson, that I had a right to join Mrs. Preiss' wall, and that one-half thereof was on my lot. I did not ascertain this until after Mrs. Preiss' building had been completed. I requested said Dickinson to make an estimate of the value of said wall, while I was building. In my contract with him, I told him I had a right to join said wall. I did offer to pay Mrs. Preiss some consideration for the use of said wall, or, rather, to buy that portion of said wall which was on my land. I made this offer, because said Preiss had threatened to stop my building, by injunction. I offered at first \$150, and afterwards \$182.92, to Mr. Williamson, the solicitor for Mrs. Preiss."

On final hearing, on pleadings and proof, the Chancellor dismissed the bill; and his decree is now assigned as error.

R. M. WILLIAMSON, for appellant, cited *Day v. Eaton*, 119 Mass. 513; *Huck v. Flentye*, 80 Illinois, 258; *Campbell v. Mesier*, 4 John. Ch. 334; Washburn on Easements, 537; 2 Greenl.

GUNTER & BLAKEY, *contra*, cited *Bisquay v. Jennelot*, 10 Ala. 245; *List v. Hornbrook*, 2 W. Va. 340; *Orme v. Day*, 5 Fla. 385; *Sherwood v. Cisco*, 4 Sandf. N. Y. 480; 2 Washb. Real Property, 334; Wait's Actions and Defenses, Vol. 2, p. 723; *Rees v. Watertown*, 19 Wallace, 107.

PER CURIAM.—The equity of the bill depends upon the promise, or agreement, alleged to have been made by Mrs. Parker, to pay for the use of the wall erected by appellant, partly on her own lot, and partly on the adjoining vacant lot, of which Mrs. Parker became the purchaser after the erec-

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tion of the wall ; for, in the absence of the promise, no liability or duty to make compensation for the use of the wall would rest upon Mrs. Parker.—*Bisquay v. Jennelot*, 10 Ala. 245 ; *Antomarchi v. Russell*, 63 Ala. 356. We concur in the opinion of the Chancellor, that the evidence does not satisfactorily establish the making of the promise, though it may show that, at one time, Mrs. Parker was willing to pay a particular sum, if that was received as full satisfaction of the claim made upon her, and she was not obstructed or delayed in the erection of her building, for the use of which the wall was necessary. Upon the authority of the cases to which we have referred, the decree of the Chancellor is affirmed.

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### *Trover.*

1. *Personal property ; when ownership of, proved by oral testimony.*—The ownership of personal property may be proved by oral testimony, unless the question of the transfer of the title arises between the parties to the conveyance, and is the direct issue in the cause, then the highest and best evidence must be produced, or its absence accounted for.

2. *Secondary evidence of written contract ; admissible when contract incidental in suit.*—When the sole purpose of secondary evidence of the contents of a written contract is to explain the contract on which the suit is based, and show the inducement to its execution, the rule requiring the highest and best evidence does not apply, but when a written contract defines and determines the relative rights of the parties between themselves, and is a main issue in the cause, it is error not to require its production as the best evidence of its terms.

3. *Trover ; damages in, how assessed.*—In assessing damages in trover, the jury may fix the value of the property converted as proven at any time between the conversion and the trial, but they are not bound to adopt the highest value proved.

APPEAL from Talladega Circuit Court.

Tried before Hon. W. L. WHITLOCK.

On January 25, 1876, E. B. Nelson brought this action against Andrew J. Street, claiming ten thousand dollars as damages for the conversion by the latter of certain mules, wagons, etc., and also 4,000 cords of wood and 50,000 bushels of coal. On the trial, by leave of the court, and against defendant's objection, the complaint was amended by adding the name of S. C. Kelly as one of the plaintiffs, and by striking out all the property described in the complaint except the wood and the coal. Said Kelly testified that about the 25th of October, 1876, said Street took some 2,012 cords of wood, which was near Munford, in Talladega county, and did

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not return any part of it to witness ; that S. C. Kelly & Co., a firm composed of witness, E. B. Nelson, and Z. H. Claridy, had a written contract with the Alabama Iron Co., the substance of which was that Kelly & Co. should furnish to said Alabama Iron Co. 500,000 bushels of coal, and which regulated the time and manner of its delivery, and the price to be paid for it. This contract was afterwards modified so as to change the amount of coal to be delivered to 300,000 bushels, and the time of its delivery was also changed. Plaintiff offered to read a copy of this contract to the jury, but the defendant objected. The court overruled the objection, and defendant excepted. The firm of Kelly & Co. was dissolved, and Z. H. Claridy was released from the contract to supply coal, as to Kelly and Nelson, but was not released by the Alabama Iron Co. The wood in controversy was cut on what was known as the McKibbin, Irvin and Bruce tracts. The witness bought the timber on the latter place from Bruce, and gave a note for the purchase-money. Plaintiffs offered this note as evidence of a purchase of the timber, but the defendant objected to its introduction, on the ground that the contract in writing for such purpose was the highest and best evidence. The court overruled the objection, and defendant excepted. The wood and coal in controversy was cut by Robbs Bros., under a contract made between witness and Robbs Bros. Witness, Kelly, thought that this contract did not mention Claridy, and that he was not a party to it. Robbs Bros. had charge of the wood and the coal at the time of the conversion, but they held it under the contract, which was in writing, and in witness' possession. The defendant then asked the court to exclude from the jury all statements as to the ownership of the wood and coal at the time of the conversion, on the ground that the contract, under which Robbs Bros. held it, was higher and better evidence than the declaration of the witness, and because the contents of a written instrument could not be proved by parol, when it could be produced and read in evidence. The court denied the motion, and defendant excepted. Witness testified that he had never paid Robbs Bros. for cutting the timber ; that he saw Street hauling the coal away, and went to see him, and demanded that he should give it up, which Street refused to do, saying that he had bought it from Robbs Bros. Witness testified that Robbs Bros. contracted to work out and complete the contract made by S. C. Kelly & Co. with the Alabama Iron Co. Defendant moved to exclude this evidence from the jury, on the ground that the written contract was the best evidence. The court denied the motion, and the defendant excepted. E. B. Nelson testified that he and Kelly



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were the owners of the wood and coal at the time Street took possession of it, and that Robbs Bros. owed him \$4,761. Defendant introduced the depositions of J. W. and E. W. Robbs, of Robbs Bros., who testified that they sold the property in controversy to A. J. Street, representing to him that it was free from incumbrance. The court, at the request of the plaintiffs, charged the jury, in writing, that "if they find for the plaintiffs, in assessing damages, they should estimate the wood and coal at the highest market value, the same possessed, as shown by the evidence, at any time between the conversion and this date, with interest on such value to this time." The charges numbered three and five (referred to in the opinion of the court) relate to the written contracts, and the effect of the stipulations contained in them, on the rights of the parties, and need not be stated. There was a verdict and judgment for the plaintiffs. The errors assigned, among others not necessary to be noticed, are the rulings on the evidence, and the charge given, at the request of the plaintiff.

BOWDON & KNOX, for appellant.—The rule of law requiring the highest and best evidence is of such antiquity, and its propriety so apparent, that it is unnecessary to discuss its authenticity, or the purpose of its creation.—*Morton v. State*, 30 Ala. 327; *Mordecai v. Beale*, 8 Port. 529.

The plaintiffs, to support this action, were required to show "property in themselves, and a right to immediate possession at the time of the alleged conversion."—*Kemp v. Thompson*, 17 Ala. 9; *Glaze v. McMillion*, 7 Port. 279. The contract, a copy of which was admitted in evidence, between the Alabama Iron Co. and S. C. Kelly & Co. was inadmissible for this purpose, or to prove any other fact, essential to entitle the plaintiffs to a recovery. The court should have compelled the production of the contract of Robbs Bros. with Kelly & Co., by which the former acquired possession of the timber which was used in making the coal. It was the highest and best evidence of the contract, and was essential to show what title Robbs Bros. acquired.

JOHN T. HEFLIN, for appellees.—The copy of the contract between Kelly & Co. and the Alabama Iron Co. was admissible in evidence. The original was not sued on, and was only incidental to the issues in the cause; but the contract shed light on the relation between Kelly & Co. and Robbs Bros., under whom defendant claimed, and explains the custody by Robbs Bros. of the property sued for.—1 Greenl. Ev. § 51,

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*P. & M. Bank v. Borland*, 5 Ala. 543; *Snodgrass v. Br. Bank*, 25 Ala. 174.

STONE, J.—It was of prime importance in this case to prove a joint ownership in plaintiffs of the property charged to have been converted by defendant. Ownership of personal property, as a rule, can be proved as a fact by oral testimony, without producing the documentary evidence which creates the title, unless the question of such transfer of title arises between the alleged parties to the conveyance. When that is the case, and the question of transfer *vel non* is the direct issue in the cause, then the highest and best evidence must be produced, or its absence accounted for.—*Graham v. Lockhart*, 8 Ala. 9; *Dixon v. Barclay*, 22 Ala. 370; *Snodgrass v. Br. Bank*, 25 Ala. 161; 1 Brick. Dig. 856, § 752; *May v. May*, 1 Port. 229; *Peck v. Dinsmore*, 4 Por. 212; *Cloud v. Patterson*, 1 Stew. 394.

It was deemed necessary by appellees, and probably was, to prove that Kelly and Co. were under a contract with the Alabama Iron Co. to deliver to it 300,000 bushels of charcoal. That contract, it seems, had been modified, so as to leave the burden of its performance on Kelly & Nelson, two of the members of the firm of Kelly & Co. As the case appears in this record, it would seem that this burden on Kelly & Nelson was, to some extent, inducement to the contract with Robbs Bros., and tends to explain why Kelly & Nelson contracted with them to manufacture and deliver coal to the Alabama Iron Co. If this be the sole purpose of such evidence, it was only incidental to the matters in issue in this cause, and the rule requiring the highest and best evidence does not apply. We are not informed what the terms and details of the contract were, by which Robbs Bros. bound themselves to burn and deliver coal. If that contract, adopted in whole or in part, or referred to the contract Kelly & Co. had made with the iron company, so as to render the provision of the latter at all material in interpreting the former, then a different rule would prevail, and the original ought to have been produced, or its absence accounted for.

The contract between Kelly, or Kelly & Co. and Robbs Bros., presents a different question. That defines and determines the relative rights of the parties as between themselves, and was a main issue, if not the main issue in this cause. The Circuit Court erred in not requiring the production of that contract in evidence, as the best exponent of its terms, and of the relative rights of the parties to this suit. In the sixth charge, given at the instance of plaintiffs, the court also erred. The jury were at liberty, in assessing dam-

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ages in trover, to fix the value as proved at any time between the conversion and the trial, but they are not bound to adopt the highest. See *Loeb & Bro. v. Flush Bros.*, at the present term.

Charges three and five given, raise a question which the present record does not enable us to answer satisfactorily. As we have said, the terms of the contract between Kelly & Co. and Robbs Bros. are not shown. Neither are we properly informed whether Robbs Bros. have been paid for the work they performed in converting the standing timber into coal, or what was the character of their possession. Whether they had a lien for the work they had performed, which would deny to plaintiffs the right to sue without payment or tender of their wages, if wages it be ; and whether plaintiffs should not have tendered to Street, as succeeding to Robbs Bros.' claim and right, before bringing their suit, are questions which the written contract will shed light on, probably. We simply state these questions for the purpose of saying they are not decided ; and the testimony may show them to be wholly immaterial. See 1 Addison on Torts, 537 *et seq.*; Cooley on Torts, 55-6.

Reversed and remanded.

## Bolling v. Jones.

*Creditors' Bill in Equity to set aside Fraudulent Conveyance by Deceased Debtor, and for settlement of Insolvent Estate.*

1. *Statute of limitations ; how taken advantage of.*—In all courts, the statute of limitations is in the nature of a personal defense, and must be specially pleaded, according to the practice and procedure of the court, or it will be regarded as waived.

2. *Assignment of error on decree from which appeal is barred ; joinder in error.* A joinder in error in a chancery cause, and a submission for decision on the merits, without any motion to strike out assignments of error based on a decree from which an appeal was barred, or to dismiss the appeal on that ground, operate as a waiver of the objection, and the assignments will not be disregarded by the court. So held in this case, the joinder being in these words : "There is no error in the record, of which the appellant can *now* complain."

3. *Consideration of mortgage ; recitals, and burden of proof.*—When the validity of a mortgage is assailed by creditors whose debts were in existence at the time it was executed, its recitals of a consideration are not evidence against them, and the *onus* is on the mortgagee to prove his debt.

4. *Rents of wife's lands ; husband's liability for.*—The husband has the right to receive the rents of the wife's statutory estate, free from liability to account (Code, § 2706) ; and his receipt and use of them do not create a liability or debt, such as will support a conveyance to the wife, as against his creditors.

5. *Homestead exemption to decedent's widow ; by what law determined, and in*



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*what lands claimed.*—The right to a homestead exemption, in favor of the widow of a deceased debtor, must be determined by the law which was of force when the debts were contracted against which it is asserted, and can only be claimed in lands in which the decedent had such an interest as might be sold for the payment of debts by his administrator.

6. *Validity of fraudulent mortgage as between parties; sale of equity of redemption.*—A mortgage, though it may be fraudulent as against existing creditors, is valid and binding as between the parties, their heirs, personal representatives, and privies in estate; and the equity of redemption remaining in the mortgagor is liable to sale by his administrator for the payment of debts, and subject to a claim of homestead exemption by his widow.

7. *Judicial sales; relief to purchaser against.*—The doctrine of *caveat emptor* applies to judicial sales, and the purchaser can not resist the payment of the purchase money, nor recover it if paid, because his purchase proved to be injudicious or worthless.

8. *Claim of homestead exemption by mortgagor's widow, when mortgage is set aside by creditors on ground of fraud.*—A mortgage executed by the husband to the wife, to secure a simulated indebtedness, being held fraudulent and set aside under a bill filed by creditors, the wife may claim a homestead exemption in the lands, or, in lieu thereof, \$500 of the proceeds of sale under the decree (Rev. Code, § 2061); but, the estate of the deceased mortgagor having been declared insolvent before the bill was filed, and the lands sold by the administrator, under a probate decree, for the payment of debts, the widow becoming the purchaser at the price of \$500, which was claimed and allowed to her as the value of her homestead interest—her homestead claim was thereby extinguished; and the lands being again sold under the decree of the court, she is not entitled to \$500 of the proceeds of sale, although the former sale was set aside under the prayer of the creditor's bill. (STONE, J., *dissenting.*)

#### APPEAL from the Chancery Court of Butler.

Heard before Hon. H. AUSTILL.

The bill in this case was filed on the 31st August, 1871, by Samuel J. Bolling, as a creditor of the insolvent estate of Joseph A. Jones, deceased, suing on behalf of himself and all other creditors who had duly filed their claims against said estate, and who might come in and contribute to the costs of the suit; against Mrs. Sarah J. Jones, the widow of said decedent, William F. Jones, his son, and James H. Perdue, as the administrator *de bonis non* of his estate; and sought to set aside, on the ground of fraud, a mortgage of a certain house and lot in Greenville, which the said Joseph A. Jones had executed to his wife and son, to secure an alleged indebtedness therein recited; also, to vacate and set aside a sale of said lands, made by said administrator under an order of the Probate Court, at which the widow became the purchaser, and to remove the settlement of the insolvent estate into the Chancery Court. The mortgage, a copy of which was made an exhibit to the bill, was dated the 22d June, 1868; recited an indebtedness on the part of the mortgagor, to his wife and said son, as evidenced by a promissory note for \$400, payable to Mrs. Jones, and two promissory notes payable to said William F. Jones, together amounting to \$800; and contained a power of sale, if default should be made in the payment of the notes by the 25th December,

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1868. Joseph A. Jones died some time during the year 1868, intestate; and letters of administration on his estate were duly granted by the Probate Court of said county, on the 29th September, 1868, to said William F. Jones, his son. In July, 1870, said administrator reported the estate insolvent, and it was so declared on the 1st September, 1870. In October, 1870, the administrator made a final settlement of his administration, and was discharged; and letters of administration *de bonis non* on the insolvent estate were thereupon granted to James H. Perdue, by virtue of his office as sheriff of the county. The complainant's debts against the estate had been duly presented to the administrator in chief, and were regularly filed as claims against the insolvent estate within nine months after the declaration of insolvency. They consisted of a promissory note for \$400, dated the 5th December, 1866, and payable on the 1st January, 1868, on which was indorsed a credit of about \$200; and a liability as surety for said Jones on a note for \$1,003.75, dated the 13th August, 1867, and payable on the 1st January, 1868, to Mrs. Elizabeth Jernigan or order. On the 16th March, 1871, the administrator *de bonis non* filed a petition, asking an order to sell the house and lot for the payment of debts, and, having obtained an order of sale, made the sale on the 12th June, 1871, the widow becoming the purchaser at the price of \$500; and the sale was reported to the court, and confirmed by it, and a conveyance executed to the purchaser under its order. The \$500 was not in fact paid to the administrator, though he acknowledged the receipt of it: that amount was allowed to the widow, on her petition, as her homestead interest in the lands, out of the proceeds of sale, and receipts were reciprocally executed by her and the administrator. At the sale by the administrator, notice of the mortgage was given, and also of the widow's claim to \$500 of the proceeds of sale; and the property was knocked down to her at \$500, the only bid made.

There was no controversy as to any of the facts above stated. The bill alleged that the debts recited in the mortgage were fictitious—that it was not supported by any consideration, and was executed with the intent to hinder, delay, and defraud the creditors of the mortgagor; that the notice and claim made at the sale on behalf of the widow, as to the mortgage and homestead right, were intended to prevent competition, and to enable her to buy in the property without paying anything for it; that she never paid the \$500, and that it was illegally allowed to her, on account of her claim of homestead, to the injury of the creditors of the estate. The bill therefore prayed, that the sale and convey-

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ance by the administrator might be set aside, cancelled, and held for naught; that the mortgage might be declared fraudulent, null and void, and be delivered up to be cancelled; that the settlement of the insolvent estate might be removed into the Chancery Court, and for general relief.

A joint answer was filed by Mrs. Sarah J. and William F. Jones, denying the allegations of fraud, and asserting the *bona fides* and validity of the mortgage. They alleged that said Joseph A. Jones was indebted to his wife for moneys belonging to her statutory separate estate, which he had received and used, and which were partly expended in paying for the lot and improvements. They admitted that notice of the mortgage, and also of the widow's homestead right, was given at the sale; and alleged that this was done in good faith, and as an act of justice to persons who might desire to bid for the property. As to the widow's homestead claim, they alleged that, on the 14th March, 1871, she filed her petition in the Probate Court, praying that "\$500 worth of real estate" might be set apart to her, out of the insolvent estate of her deceased husband, as her homestead right; that commissioners were thereupon appointed by the court to make the allotment; that the commissioners reported to the court, on the 23d March, 1871, "that said real estate could not be set apart without injury to the remainder of the estate; whereupon the judge decreed that all of the lands of said estate be sold, and that the administrator should pay \$500 to the said Sarah J. Jones in lieu of a homestead;" and that the \$500 bid at the sale was paid by an exchange of receipts between the administrator and the widow, as above stated. Copies of the report of sale by the administrator, the confirmation of the sale, and the decree allowing \$500 to the widow, on account of her homestead right, were made exhibits to the answer. A demurrer to the bill, for want of equity, was incorporated in the answer; and it was insisted, by way of plea, that the complainant had forfeited his right to relief, by his failure to object to the sale, at which he was present, or to the proceedings in the Probate Court, of which he had personal notice, and to which he was a party.

The bill alleged that the house and lot were worth at least \$2,000, but the answer alleged that the value was not more than \$1,000, or \$1,200; while the testimony of the complainant's witnesses estimated it at between \$1,500 and \$2,000. No testimony was taken by the defendants, or either of them, to prove the debt to William F. Jones, as recited in the mortgage; and the only proof as to the recited debt due to Mrs. Jones, was in the deposition of Joseph R. Jones, a younger son, who testified to the receipt of moneys by the



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decedent, after his marriage with Mrs. Jones in 1865, accruing from the rents of lands belonging to her.

The cause being submitted for decree on pleadings and proof, at the October term, 1875, the Chancellor rendered a decree, holding that the mortgage was fraudulent and void so far as it related to the recited debt due to William F. Jones, and that the complainant was entitled as against him; setting aside the sale and conveyance by the administrator; removing the settlement of the estate into the Chancery Court; and ordering a reference to the register, to ascertain and report—1st, whether the widow was entitled to dower in the house and lot; 2d, whether she was entitled to \$500 “of the proceeds of the property;” 3d, the claims filed against the estate; and, 4th, “*the amount due complainant on the debt secured by the mortgage in her favor by William F. Jones, deceased(?)*” This decree was rendered on the 27th October, 1875. At the April term, 1876, the register reported, that the widow was not entitled to dower, on account of the value of her statutory separate estate; that she was entitled to \$500 of the proceeds of the property; and that the amount due to her, on the debt secured by the mortgage was \$668.43. The report was confirmed, without objection; and on the 22d April, 1876, the Chancellor rendered a decree, or decretal order, declaring that the widow, not being entitled to dower, was chargeable with the reasonable rent of the house and lot during her occupancy, and directing the register to ascertain and report the value thereof, with interest.

At the ensuing October term, 1876, the register made his report, charging the widow with rents amounting, with interest, to \$1,589. Exceptions to this report were filed by the widow, but were overruled by the Chancellor, at the same term (October 19th, 1876); and he proceeded to decree as follows: “But, upon hearing the arguments on the matters reported upon, and on further consideration, the court is of opinion, that Mrs. Sarah J. Jones should be charged with rents as mortgagee in possession; and to that end it is now ordered, that the matters be again referred to the register, to take an account between the said Sarah and the estate of the said Joseph A. Jones, deceased. He will allow the said Sarah credit for taxes paid, and for necessary repairs put upon the premises, since the death of said Joseph; and will apply the rent of each year, commencing after the death of her said husband, first to the payment of the interest due on the said mortgage, and the balance, if any, to the satisfaction of the principal.” The register made his report under this reference, and in compliance with its terms, showing a balance of \$305.73 as due from Mrs. Jones to the estate.

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This report was made at the October term, 1877, and was confirmed by the Chancellor, against the objections and exceptions filed by Mrs. Jones. At the same term, an affidavit and claim of exemption was filed by Mrs. Jones, claiming an interest of \$500 in the premises, or proceeds of sale, "which has been decreed to her by the Probate Court of said county, and which she now claims as exempt from any liability which has accrued under the decree of this court, or which may hereafter accrue against her, for rent, or for use and occupation, or for costs, or in any other manner whatever." The cause being submitted for final decree at the same term, the Chancellor rendered a decree, ordering a sale of the property by the register; directing him to pay \$500, out of the proceeds of sale, to Mrs. Jones; and awarding execution against her, in favor of the administrator, for \$305.73, the balance of rents reported against her by the register.

The appeal was sued out by the complainant on the 1st November, 1878. The errors assigned are—1st, "the decree holding that the mortgage was valid as to said Sarah J. Jones"; 2d, "the decree allowing Mrs. Jones a homestead right of \$500 in the premises"; 3d, "decreeing that Mrs. Jones was entitled to be credited with amount of repairs on the premises"; 4th, "decreeing costs against complainant"; 5th, "not decreeing that the mortgage was fraudulent as against complainant"; 6th, "in each and every ruling against complainant"; 7th, "in allowing \$500 to Mrs. Jones, when she was ascertained to be indebted in a large sum for rents, which should have been deducted from the said \$500." There was a joinder in error, in these words: "There is no error in the record, of which the appellant can *now* complain."

WATTS & SONS, for appellant.

HERBERT & BUELL, *contra*.

BRICKELL, C. J.—All the assignments of error, except the fourth and the seventh, relate to matters involved in the final decrees settling the equities of the cause, or, rather, declaring and defining the rights of the parties, rendered more than two years before the appeal was taken. The statute of force when the decrees were rendered, and when the appeal was taken, limited appeals to two years from the rendition of the judgment, or decree. It is insisted in the argument submitted by the counsel for the appellees, that these assignments must be disregarded, because an appeal from the decrees into which the errors are supposed to have entered was barred. The appellees joined in the assignment of errors,

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and submitted the cause for decision, without having pleaded in bar the statute of limitations, or moved to strike out the assignments, or to dismiss the appeal.

In all courts, the statute of limitations is in the nature of a personal defense, which must be pleaded specially, according to the practice and procedure of the court, and, if not pleaded, must be regarded as waived.—Ang. on Lim. § 285. Such statutes are not limitations on the jurisdiction of courts, which is bounded by subject-matter and by parties. They are intended solely for the benefit and protection of parties, and may be relied on, or waived by them, as they may be advised, or may deem most proper. At common law, writs of error were governed by rules of pleading analogous to, and as well defined as the rules of pleading in original actions in courts of original jurisdiction. The assignment of errors was in the nature of a declaration. To this assignment the defendant pleaded or demurred, as he was advised. The pleas were common or special. The common plea, being simply an averment that there was no error in the record, was a mere joinder with the plaintiff in error, in referring the matters at law to the judgment of the court. Special matters were pleaded specially, either in abatement, or in bar. A release of errors, or that the writ of error was barred by the statute of limitation, was the matter of a special plea in bar.—2 Tidd B. 1168-75. If these were not pleaded, the court did not notice them, and of them no advantage could be claimed by the defendant.—*Brooks v. Morris*, 11 How. (U. S.) 204; *Merriam v. Haas*, 3 Wall. 687.

In this court, the matter has been the subject of rules, adopted soon after the organization of the court, under which a practice, in some respects variant from the practice at law, has grown up, and been of uniform recognition. The rules substantially correspond with the uniform law, as to the assignment of errors, and the common plea, or joinder, in error. Special pleas have not been required, but of the matter of such pleas, the defendant in error has been permitted to avail himself by motion addressed to the court, of which notice is given the plaintiff in error by the entry on the motion docket of the court. The right of a plaintiff to bring error to reverse his own judgment, if injustice has been done him, as where it is for a less sum than he claimed, is unquestioned. If, however, he elected to execute the judgment, compelling the defendant to its payment, he was barred of the writ of error. In numerous cases, this court, without compelling the defendant in error to a special plea, has, on motion, required the plaintiff in error to make restitution, or dismissed the writ of error.—1 Brick. Dig. 104, §§ 306-10. So, of the statute of



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limitations, the defendant in error has availed himself, by motion to dismiss the appeal, or to strike out the particular assignments of errors which were supposed to be within its influence.—1 Brick. Dig. 104, §§ 311-321; *Garner v. Prewitt*, 32 Ala. 13; *Bradford v. Bradley*, 37 Ala. 453; *Turner v. Turner*, 44 Ala. 437. In all this class of cases, the motion was made and submitted before a joinder in error; or, if there was submission on the merits, it was accompanied with the reservation of the motion, and an agreement that it should be heard and considered notwithstanding the submission on the merits. In other words, by agreement of parties, the motion to dismiss, because of special matter, was not to be regarded as waived, or abandoned, because of the submission on the common joinder in error, but that it was reserved and the submission on the merits was subject to it.

A joinder in error, so far as I know, or can discover from the reports, has been given the operation and effect it had at common law. It is a waiver of all matters which do not go to the jurisdiction of the court; of all defects in the manner of introducing the cause into this court; of every matter which ought, at the common law, to have been specially pleaded.—*Magruder v. Campbell*, 40 Ala. 611; *Carter v. Thompson*, 41 Ala. 375; *Alexander v. Nelson*, 42 Ala. 462; *Thompson v. Lea*, 28 Ala. 453. This precise question, whether the statute of limitations is waived by a failure to move to dismiss the appeal, or to strike out the assignment of errors offensive to it, and a joinder in error, has not, so far as I know, been the matter of an express decision. On principle and authority, I have no inclination, if I had the right, to disregard it as a waiver by the appellees of a statute intended for their benefit, and which they may plead or not at discretion.

The mortgage executed by the intestate, Joseph A. Jones, the validity of which is assailed by the original bill, was executed after the debts of the appellant, Bolling, had been contracted, and after he had become liable as surety on the debt to Mrs. Jernigan. To support, as against the claims of existing creditors of the mortgage, it must be shown that it rests on a valuable consideration; that the debts it purports to secure were just, legal demands. This is not shown by the recitals of the mortgage.—2 Brick. Dig. 22, §§ 121-134. There was no effort to support the debt recited as due and owing to William F. Jones, the son of the mortgagor; and as to that debt the mortgage was pronounced void. The consideration of the other debt, recited as owing to the wife of the mortgagor, was the rents of lands, her statutory separate estate, accruing during coverture, the mortgagor, and husband, had received. These rents the husband had the right to re-

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ceive, free from liability to account, and are not a valuable consideration which will support the mortgage as against existing creditors.—*Early & Lane v. Owens*, at the present term.

The exemption of a homestead to the widow could only be claimed under the former statute.—R. C. 1867, § 2061. This was the only law of force, conferring exemptions, when the debts were contracted, to the payment of which it is sought to subject the premises in controversy. It is apparent from the statute, that a homestead was not given to the widow in lands the husband had aliened in his life, but only in lands of which he died seized, having an estate therein of which his personal representative, under an order or decree of the Court of Probate, could make sale for the payment of debts. The mortgage, though void at the instance of pre-existing creditors, is valid as between the parties, their heirs, personal representatives, and privies in estate by mere operation of law.—*Rochelle v. Harrison*, 8 Port. 351; *Dearman v. Radcliff*, 5 Ala. 192; *Marten v. Marten*, 6 Ala. 367; *Walton v. Bonham*, 24 Ala. 513; *Wiley v. Knight*, 27 Ala. 336. There remained in the mortgagor, at the time of his death, no more than the equity of redemption in the premises. This was an interest the Court of Probate had jurisdiction to order the personal representative to sell for the payment of debts, and a purchaser at the sale would become invested with it.—*Perkins v. Winter*, 7 Ala. 855; *Duval v. McLoskey*, 10 Ala. 636.

The equity of redemption was, also, an estate in which the widow could claim a homestead exemption; or, if the homestead could not be set off to her, without injury to the lands of which it was a part, could claim its value, five hundred dollars, from the proceeds of the sale made by the personal representative. The Court of Probate, having ordered a sale of the lands for the payment of debts, and having ascertained that the homestead could not be assigned and separated from the lands, properly allowed the widow five hundred dollars from the proceeds of the sale made by the personal representative. When this was paid to her, as it was by crediting her bid for the premises, her claim of homestead exemption was satisfied. If a stranger had purchased at the sale made by the administrator, and from his bid the money had been paid to her, I suppose this would be conceded. Whatever might be the defects in the title, or of however insignificant value the estate of the intestate in the premises, the purchaser could not be relieved from the payment of the purchase-money, or reclaim it if paid. To all such sales the maxim, *caveat emptor*, applies—the purchaser buys at his peril, and can claim no relief if his purchase proves worthless.

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*Burns v. Hamilton*, 33 Ala. 210; *Hickson v. Linggold*, 47 Ala. 449; *Port v. Hadnett*, 18 Ala. 752. The widow, having become the purchaser of the premises at the sale made by the personal representative, was, therefore, a purchaser at her own peril, bound to the payment of the purchase-money, whether the title she acquired was of value or worthless. If she were now allowed a homestead exemption, in effect, she would be permitted to do that which no purchaser at a judicial sale has ever done in the absence of fraud—reclaim the purchase-money because the purchase was injudicious.

The chancellor erred in not vacating the mortgage, and in the allowance of a homestead to the widow.

Reversed and remanded.

STONE, J. *dissenting*.—On one question I dissent in this case; the extent of the relief to which complainant is entitled. If there had been no sale by the administrator, of intestate's interest in the lands in controversy, no one will deny that Mrs. Jones would have been entitled to homestead, or its value in commutation. This, on the very familiar principle, that no matter how fraudulent the mortgage may have been, which Jones, the intestate, executed, to the extent of the homestead interest it did the creditors no harm. They had no right to subject that to their demands, whether retained by the husband, or fraudulently conveyed by him. If the mortgage was fraudulent, to this extent it was not fraudulent against creditor; for they had no interest in that part of the tract, or right to subject it to their demands.—*Fellows v. Lewis*, 65 Ala. 343.

There is still another reason why I think my brothers have erred in their judgment in this cause. Under their ruling, Mrs. Bolling recovers the entire proceeds of the land, including the homestead commutation. Now, there is no pretense that the administrator did less than his duty in selling the intestate's interest in the land. That interest was the equity of redemption, more or less valuable, as the mortgage debt fell below, or equalled the value of the lands. The equity of redemption was all he could sell; for standing in the shoes of the intestate, and clothed only with the right he could have asserted, he could not assail the mortgage for fraud, no matter how fraudulent it may have been. He was, equally with the intestate, estopped from setting up the fraud in avoidance of the mortgage.—1 Brick. Dig. 664, § 358; 1 *Ib.* 16, § 45; 1 *Ib.* 959, § 632. Thus, the administrator could sell only the equity of redemption, and he did sell that under the order of the probate court, and the widow became the purchaser. It is not charged that that proceeding and sale were irregular,



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or fraudulent. She then acquired all the interest which the intestate owned at his death. Did she buy her homestead exemption? She already owned that. The entire tract was sold, why? Not because it was subject to administration, nor because the entire proceeds would be assets for the payment of debts. They would not be. The homestead could not be carved out by metes and bounds, and the entire tract was sold, as the only means of ascertaining and separating the assets of the estate from the homestead exemption. Only the *residuum* above the homestead was assets of the estate, and that was the sum, the entire sum, the administrator would be chargeable with as assets. She did not buy her homestead; but the effect of the transaction was a purchase of that part of the land, which was in excess of the value of the homestead. As we have said, she already owned the homestead exemption. Suppose a stranger had purchased, and received a conveyance. Would he not, by virtue of the purchase, have acquired the widow's exempt homestead right? And as to it, would it not be, in effect, a purchase from the widow herself? The money would be payable, and paid to her, and the corresponding interest in the land would, by virtue of the sale, pass out of her, and vest in him? And would not the interest, thus acquired, become his, not as derived from the estate of the intestate, but as purchased from the widow? And suppose, in such case, a creditor of the intestate should proceed to condemn the lands for the payment of intestate's debts, on account of the fraud, such intestate had committed in the execution of a former mortgage, could he condemn the homestead exemption, which had been purchased and paid for by a stranger, and which had never been subject to intestate's debts? Would not such purchaser have the legal title, and a paramount equity? And would not an attaching creditor, seeking to subject the land, be confined in his recovery to the excess above the value of the homestead? That was all he could rightfully claim before the administration sale. Could a rightful and fair sale made by an administrator, and an honest purchase by a stranger, increase the equities of a creditor, whose only right was to pursue assets the administrator could not claim; namely, the interest sought to be conveyed by the fraudulent mortgage? I confess myself unable to perceive why the fact that the widow became the purchaser should subject her to the forfeiture of her homestead, when a purchasing stranger certainly would not have been mulcted. I hold that the five hundred dollars commutation of the exempt homestead, should be paid to Mrs. Jones out of the proceeds of the lands; and in doing

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so, I leave Mr. Bolling precisely where he would have stood, if there had been no administration sale.

Other questions may arise under proceedings like the present. A fraudulent mortgage may be made, in amount much less than the value of the property mortgaged. Suppose the mortgagor dies, and it becomes necessary to sell his interest in the lands for the payment of debts. Now, as to such *residuum* of interest in the deceased mortgagor, his personal representative is the proper person, and the only proper person, to obtain an order, and sell it. It is his duty to do so, and he commits a *devastavit* if he neglects it. He makes a sale, and an innocent purchaser pays his money for this equity of redemption. Suppose afterwards a creditor, as he may do, proceeds in equity to subject the lands to the payment of his demands. What interest can he condemn? Is it the entire fee, or only that interest which the personal representative could not and did not sell—namely, the mortgage interest? True, the sale made by the administrator is what is called a judicial sale, and the rule of *caveat emptor* applies. But, the second, or chancery sale, is equally a judicial sale, and the same rule applies to it. I ask these questions, without intending at this time to answer them.

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### *Contest of Creditor's Claim Against Insolvent Estate.*

1. *Filing claims against insolvent estate.*—When a claim against an insolvent estate, duly verified, is filed within nine months after the declaration of insolvency (Code, § 2568), the failure of the probate judge to register or docket it, does not invalidate the filing; but, when the creditor relies upon a filing made before the decree of insolvency, he must show that the claim was verified as a claim against an insolvent estate, and was duly registered or docketed so as to afford notice and opportunity for filing objections to it. (Explaining *Lerert v. Read*, 54 Ala. 529, and *Shelton v. Poulson*, 60 Ala. 578.)

2. *Revision of probate decree, on question of fact.*—On appeal from a probate decree on a disputed question of fact, "it requires a very clear conviction of error to justify a reversal."

APPEAL from the Probate Court of Macon county.

Heard before the Register in Chancery, on account of the disqualification of the probate judge.

In the matter of the insolvent estate of John C. Henderson, deceased, against which a claim was asserted by Joshua M. Henderson, the allowance of which was contested by the

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administrator and distributees, on the ground that the same was not filed within nine months after the declaration of insolvency. The claim, as asserted against the insolvent estate, was in the form of a judgment for \$750, rendered by the Circuit Court of said county, at its Spring Term, 1867, in favor of the claimant, and against Lemuel Henderson, the former administrator of said John C. Henderson. This judgment was founded on a claim for \$500, which had been filed against the estate of said decedent by said claimant, according to the testimony of the claimant's attorney by whom it was filed, "prior to the 13th March, 1858, and before the expiration of eighteen months from the grant of letters to the said Lemuel Henderson;" but, being contested by the administrator, suit was brought upon it, and judgment recovered as above stated. "It was admitted that said Lemuel Henderson, the administrator-in-chief of said John C. Henderson, made a partial settlement of said estate in June, 1861, and distributed about \$10,000 among the heirs, being all the assets except about \$1,000, which was ordered by the court to be retained in the hands of the administrator, to meet whatever judgment might be recovered in the suit on said claim; that this was the only claim outstanding against said estate; that said estate was reported and declared insolvent on the 13th May, 1867, within a month or so after the recovery of said judgment;" and the claimant's attorney testified, that the declaration of insolvency was made in consequence of the recovery of this judgment. It was admitted, also, that at the June term of said Probate Court, 1877, "a decree was rendered against said administrator, for \$1,576, being the amount of the said sum retained, with interest thereon, and which is now assets in the hands of the administrator *de bonis non*."

The original claim as filed, and the book in which it was registered or entered, were proved to be lost; and the matters of controversy were, as to the verification of the claim when originally filed, and as to the filing and verification of a transcript of the judgment. As to the filing and verification of the original claim, R. F. Ligon, the claimant's attorney in all the litigation, testified, "that said claim was filed in the office of the Probate Court of said county, prior to the 13th March, 1858, and before the expiration of eighteen months from the grant of letters to said Lemuel Henderson, as a subsisting claim against said estate, and, according to the best of his recollection, was properly verified by one Hollis; that said claim was entered on the book kept for the registry of such claims in the probate office; that said claim and book have both been lost, and neither can be found



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after diligent search in the places where they ought to be ; that he has no distinct recollection of the contents of the verification made by said Hollis, and cannot, from his recollection of said affidavit alone, state any thing as a fact that may have been therein stated ; and that he thought he had made the affidavit, until a recent interview with Mr. Clopton, his associate counsel, who, he found, had filed the claim himself."

To prove the filing and verification of the judgment, the plaintiff took the deposition of J. T. Meniffee, who was one of his attorneys in the original litigation, and who thus testified : " His best recollection is, that a certified copy of said judgment was filed in the Probate Court of said county in the summer of 1867, say in July or August ; cannot say just how long after said estate was declared insolvent ; does not remember when said estate was declared insolvent ; thinks it was in the early part of 1867 ; is satisfied that it was within nine months after the declaration of insolvency, for the following reasons : I had many interviews with Capt. R. F. Ligon about this case, and on one occasion, while speaking about it, he referred to the declaration of insolvency, and asked me, he being about to leave town, to procure a certified copy of the judgment, and have it verified and filed in the Probate Court ; which I did. According to my best recollection, this was done in the summer of 1867, say July or August. I am satisfied that said transcript was verified, and that I, as one of the attorneys, did it. The verification was in the usual form, and was to the effect that the debt evidenced by the transcript was just, due, and unpaid. The verification was made, either before Mr. Bilbro, who furnished the transcript, or before Judge Stanton, the judge of the Probate Court ; if before Bilbro, it was before the filing, I think ; if before Judge Stanton, it was at the time, I think. My memory won't tell me before which officer it was verified. The transcript had the certificate of the clerk attached, and was handed by me to Judge Stanton, for the purpose of being filed against said estate. My best recollection is, that said transcript was filed in July or August, 1867, by Judge Stanton writing the word *Filed* on the back of the transcript with the date. Stanton was then judge of probate. Can't say the claim was entered on the book kept for that purpose ; don't remember. I ceased to recur to this claim eight or nine years since ; don't remember to have thought of it for eight years. I am interested to the amount of one-half of the fees, and expect to get a part of the funds in the event said Joshua Henderson wins."

The claimant also introduced R. H. Abercrombie as a wit-

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ness, " who testified, that he was the attorney for the administrator-in-chief in the claimant's suit against him, and also in the proceedings for declaring the estate insolvent, the decree of insolvency being rendered within a month or two after the recovery of said judgment ; that within nine months after the declaration of insolvency, to the best of his recollection, though he can not remember exactly how long afterwards, he saw J. T. Menifee in the office of the probate judge of said county ; that Menifee then had in his hands a transcript of the judgment in the claimant's said suit against the administrator of said estate, and attached thereto was the certificate of the clerk of the Circuit Court, the verbiage of which he could not remember, nor all the contents thereof, but he does remember, as a fact, that said transcript contained a statement of the case, the names of the parties, and the amount of the judgment, which was \$750 ; that he examined said transcript closely, and remembers that he saw no objection to it, except that there was no verification indorsed on it nor then attached to it ; that he never saw said paper afterward, and does not know whether or not Menifee swore to it afterwards ; does not remember whether said claim was indorsed *Filed* or not, but knows that said claim was the only claim against said estate, and that said estate was declared insolvent because of the judgment recovered on said claim." This witness stated, on cross-examination, among other things, " that he did not remember anything as to any indorsement showing that said transcript was filed, and is certain there was no verification of it ; that Menifee was trying to compromise said claim with him, and he continued the negotiations with the hope of having the claim barred by the statute of non-claim ; that his knowledge of the contents of said transcript is based upon what he knew of the facts of the case," &c.

The claimant introduced P. S. Holt as a witness, who was the probate judge of said county, and " who testified that, in 1872, or 1873, he, as the attorney of the heirs who are contestants, searched the papers and records in the probate office, to ascertain if he could find any claim against the estate of said J. C. Henderson, either in the book of claims, or among the papers of the office, and found none filed or registered against the insolvent estate ; that he has again searched, since he has been probate judge, in the place where such papers are usually kept, for claims, but could find none in the office ; that the book in which claims against estates were registered, was not in the office, and had not been since 1875, having been lost ; that one Stanton was probate judge in 1867, and was very careless in handling the papers of the

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office." The witness further testified, "that he was the clerk for said Stanton while probate judge in 1867, until he went out of office in August, 1867, and attended to the filing and recording of papers; that Stanton attended to but little of that kind of office work; that no transcript of a judgment against said estate, in favor of the claimant, was ever handed to him to file against said estate, nor did he file any in 1867 or 1868, nor did he see or know of any such claim in said office; that a claim might have been handed to Stanton, the probate judge, in his office, to be filed against said estate, without his (witness) knowing about it, nor can he state that such was not done; and that when he first searched the office, as above stated, in 1872, or 1873, he was accompanied and assisted by one A. A. Henderson, one of the distributees and contestants."

The claimant then offered in evidence a transcript of his said judgment, and also a substantial copy of his original claim as filed, to each of which was attached an affidavit made by his attorney before said Holt as probate judge, as to its correctness, and as to the facts connected with the filing, above stated; and R. H. Abercrombie, his attorney, testified as a witness in his behalf to the same facts. The transcript and copy-claim were rejected on motion of the contestants, and the claimant excepted. The contestants introduced James E. Cobb as a witness, "who testified that, in 1872, or 1873, he, as the attorney for the heirs of said J. C. Henderson, examined the records of the Probate Court, and among the papers pertaining to the estate of deceased persons, with a view of ascertaining if there was any record or statement of this claim against the insolvent estate of said J. C. Henderson; that he saw a statement of a claim, made on a docket of claims against the solvent estates of deceased persons, in favor of J. M. Henderson, against this estate, but there was no such claim on file in said office, and no such claim was docketed against said estate, on the docket of claims against insolvent estates." On all the evidence adduced, the substance of which is above set out, the court sustained the objections of the contestants, and excluded the claim; to which ruling and decree the claimant duly excepted. The final decree, and the rulings on the evidence, are now assigned as error.

R. F. LIGON, for appellant, cited *Levert v. Read*, 54 Ala. 529; *Shelton v. Poulson*, 60 Ala. 578; *Phillips v. Blevins*, 38 Ala. 252; *Flinn v. Shackelford*, 42 Ala. 202; *Erwin v. McGuire*, 44 Ala. 504; *Thornton v. Moore*, 61 Ala. 351; Sess. Acts 1869-70, p. 435.



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H. C. TOMPKINS, J. A. BILBRO, and A. H. GRAHAM, *contra*, cited *Sharp v. Harris*, 32 Ala. 502; *Puryer v. Puryer* 34 Ala. 555; *Dennis v. Coke*, 34 Ala. 611; *Beeve's Adm'r v. Phillips*, 37 Ala. 312.

STONE, J.—Counsel for appellant seem to misapprehend the principle settled in the cases of *Levert v. Read*, 54 Ala. 529, and *Shelton v. Paulson*, 60 Ala. 578. It was not our intention to decide, in those cases, that a mere presentation of a claim to the administrator, within eighteen months after his appointment—made in the ordinary way, which prevents the bar of the statute of non-claim—*per se* dispenses with the necessity of filing the claim, verified, within nine months after the estate is declared insolvent. In the first of those cases, although the claim had been filed before the final decree of insolvency, it was done after the report of insolvency, and while proceedings thereon were pending. It was filed, verified, and was duly registered in the probate office. The claim remained in the office, and the filing was transcribed in that office in the book entitled 'Docket of Insolvent Claims.' We said: "Mrs. Levert, in filing the claim verified, did so with a view to a compliance with the requirements of the statute." It is manifest that, in that case, no one was, or could be misled, by the fact that the filing antedated the decree of insolvency.

In the case of *Shelton v. Paulson*, the claim was also filed, verified, between the report and declaration of insolvency, and was left of file in the court. The Probate Court ruled the filing sufficient, "being of the opinion, and so ruling and holding, that said claim had been filed in this court, as a claim against said insolvent estate, and all the while since said filing and docketing had remained in said court, or on file with the papers of said estate, the same having never been withdrawn after the declaration of insolvency." According to this finding of the court, the filing in that case was evidently intended as a filing in the insolvency. It was filed four months after the report of insolvency, and yet before the decree; was verified, docketed, and the claim remained in the court all the while, until the settlement. We ruled, that, the claim asserted fell within the principle settled in *Levert v. Read*, *supra*.

In each of these cases, it can not be doubted the claim was intended to be filed as a claim against the insolvent estate. We did not, in our rulings, intend to dispense with such filing. What we intended to decide, and did decide, was, that when a claim was filed, verified, was docketed, or placed on the register of claims against the estate, the administrator

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and other creditors were furnished all the information needed in filing objections to it, and would not be heard to object that the filing was premature. The docketing or registration, was the notifying fact, which, in our opinion, disproved any and all injury that might result from a failure to wait until the decree of insolvency was pronounced, before verifying and filing the claim. A claim, not registered and verified, would furnish no excuse for failing to file within nine months after the declaration of insolvency. It is only when there is registration, or docketing, that this irregularity becomes harmless. A different rule prevails, when the claim is filed, verified, within the nine months. That being done, a neglect of the judge of probate to docket or register the claim would not invalidate the filing.

In the present record, it is, perhaps, shown that the claim was filed in the Probate Court, as a claim against Henderson's estate, within eighteen months after administration was granted. How that claim, then an open account, was verified, is not clearly shown. Several years afterwards, this claim was reduced to judgment, and not long after that, the estate was declared insolvent. The disputed question is, whether the claim was filed, verified, within nine months after the decree of insolvency. We do not think the proof is clear and full enough to produce a conviction, either that in the original filing of the claim, it was verified as claims against insolvent estates are required to be, or that it was registered or docketed so that persons searching for information could obtain it. So, we need not inquire whether a filing in 1861, or 1862, in lieu of presentation as a claim against the estate, could be so made as to dispense with filing, verified, against the insolvent estate, in 1867.

The question in the case then remains, is it affirmatively shown that the claim was filed, verified, within nine months after the decree of insolvency? The witnesses were examined before the register, sitting for the judge of probate, and on their testimony he found this issue in favor of the contestants, and disallowed the claim. Under the rule which obtains in such cases, we do not feel at liberty to reverse his finding. It requires a very clear conviction of error, to justify a reversal in such case.—*Dam v. Mayor*, 36 Ala. 304; *Kirksey v. Kirksey*, 41 Ala. 626; *Howard v. Harper*, 54 Ala. 629; *Ex parte Nettles*, 58 Ala. 268.

What is said above renders a consideration of all other questions immaterial. The testimony rejected did not tend to strengthen the oral proof of filing; and hence, whether right or wrong, ruling did the appellant no harm.

Affirmed.

[Elmore v. Simon &amp; Bro.]

**Elmore v. Simon & Bro.***Trover.*

1. *Amended complaint: filed without leave of court.*—When, in an action of trover commenced before a justice of the peace, the plaintiff files, without leave of the court, an amended complaint containing a count in case, it is error to strike such amended complaint from the files.

2. *Trover; what necessary to maintain, and when mortgagee can not maintain.* The plaintiff, to maintain trover, must have at the time of suit brought, either the absolute or a qualified property in the chattels alleged to have been converted, and the right to immediate possession; but a mortgagee has not this right, when, by the mortgage, he is only authorized to take possession of the property after default, or the law day of the mortgage.

3. *Mortgage of unplanted crop conveys only equitable title.*—A mortgage of an unplanted crop conveys only an equitable title which will not support trover, detinue, or trespass.

**APPEAL from Montgomery Circuit Court.****Tried before Hon. J. Q. SMITH.**

This was an action of trover brought on October 1st, 1879, by Frank H. Elmore against J. Simon & Bro., and was commenced before John B. Fuller, Esq., a justice of the peace of Montgomery county. The complaint, which was in the form prescribed by the Code for actions of trover, claimed damages for the conversion of a bale of cotton on which the plaintiff held a mortgage. This mortgage contained a stipulation that, "in the event, we, (the mortgagors), shall fail or refuse to deliver twenty-five hundred pounds of lint cotton . . . to said Elmore, . . . on or before the 15th day of September, 1879, then, and in that event, the said Elmore or his agents, are authorized and empowered to enter upon, seize and take into possession said crops of cotton, &c., and sell them." The mortgage was executed January 22, 1879. The justice rendered a judgment against the defendants, who, thereupon, took the case, by appeal, to the Circuit Court. When the cause was called for trial, the defendants moved the court to strike from the files an amended complaint which had been filed, on the day before, by the plaintiff, but without the leave of the court. This amended complaint contained a count in case on the same cause of action as that on which the original complaint was founded. The court granted this motion, and plaintiff excepted. The case was tried by the court, without the intervention of a jury, on an agreed statement of facts. It appeared from the statement



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that the defendants purchased the bale of cotton in controversy from Frank Simon, on September 9th, 1879, for \$47, its fair value, and without any knowledge of the existence of plaintiff's mortgage; that the cotton sued for was embraced in the mortgage; that out of the proceeds of its sale to defendants the landlord had received \$25 in payment of rent; that the plaintiff had realized no money from said cotton, and that he could not collect his debt out of the other property embraced in the mortgage; that plaintiff made a demand on defendants for the cotton before bringing suit, and they replied that they had sold it. There was a judgment for the defendants. The errors assigned are, the rendition of the judgment, and the action of the court in striking the amended complaint from the files.

GUNTER & BLAKEY, for appellant.—The amendment of the complaint should have been allowed.—*Schuessler & Co. v. Wilson*, 56 Ala. 516. The fact that it was filed without leave of the court could make no difference, for if the amendment was proper in itself, the court was bound to grant leave to file it. The amendment was a sufficient count in case, and trover and case may be joined.—*Dixon v. Barclay*, 22 Ala. 370. In the absence of a reservation of possession in a mortgage the possession follows the title, and could be taken even before the law day.—*Booker v. Jones' Adm'r*, 55 Ala. 274; *Ellington v. Charleston*, 51 Ala. 168. There was no such reservation in the mortgage before the court. The stipulation in the mortgage that Elmore could take possession of the mortgage property after default did not amount to a reservation of title. The case upon which appellees rely, (*Smith v. Taylor*, 9 Ala. 637), seems to assert the contrary, but it is mere dictum, and is in conflict with an array of cases extending from *Duval v. McCloskey*, 1 Ala. 737, to *Toomer, Sykes & Billups v. Randolph*, 60 Ala. 360. But, even if the mortgage contained such a reservation, the plaintiff, appellant, may recover, for the mortgagor held possession as a *quasi* bailee under the mortgage, for the title was in the latter, and the bailment was terminated by the sale.—*Whitney v. Lowell*, 33 Me. 318; Herman on Chattel Mortgages, § 71. If a mortgage is to be any protection to a creditor, he should be permitted to recover under the facts shown, either in case, or in trover.

RICE & WILEY, for appellees.—The amendment to the complaint was filed without leave of the court, and was properly stricken from the files. A court of record has power to protect its files by striking therefrom anything which was

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not rightfully placed upon them.—Code, § 3156. To maintain trover there must be a right to the property, general or special, and possession or the immediate right of possession. *Webster v. Jones*, 55 Ala. —; *Kemp v. Thompson*, 17 Ala. 9. Trover will not lie for property converted before the law day of the mortgage, where the mortgage provided, that after default of payment the mortgagee might enter; the possession by legal intendment and presumption being in the mortgagor. Where a mortgage provides that after default of payment the mortgagee might enter, the mortgagor is entitled to possession until such default.—*Smith v. Taylor*, 9 Ala. 633; *Desha, Sheppard & Co. v. Scales*, 6 Ala. 360; *Hathaway v. Brayman*, 42 New York R. (Court of Appeals, Hand), 322. The case last above-cited, 42 New York, is exactly in point, and we invite the attention of the Court particularly to it.

SOMERVILLE, J.—This case, having been first tried by a justice of the peace, was taken by appeal to the Circuit Court, and was there tried, by written consent of the parties, without the intervention of a jury.—Code, 1876, §§ 3029–30. The papers sent up from the justice's court disclosed an action of trover for one bale of cotton, the complaint being in substantial compliance with the form prescribed by the Code. The plaintiff filed with the clerk of the Circuit Court what purported to be an amended complaint, which was a count in case, based on the same cause of action. This was done without leave of court, and on motion of the defendant was stricken from the files by the court.

We think this was error. The statute is studied in its avoidance of all technicalities in such trials. It provides that such cases shall be "tried according to equity and justice without regard to any defect in the summons or other process before the justice."—Code, 1876, § 3121. It was both the right and duty of the plaintiff to file a statement of his cause of action before proceeding to trial. No leave of court was requisite for this purpose. A judgment by default rendered without it would constitute error for which judgment would be reversed in the appellate court.—*Arundale v. Moore*, 42 Ala. 482. Though called an "amended complaint," it was clearly designed to be taken as a statement of his cause of action, in connection with the count in trover disclosed by the original papers. The court ought to so have considered it, and as *trover* and *case* may be properly joined, it was error to strike this statement from the file of papers in the cause. *Schuessler & Co. v. Wilson*, 56 Ala. 516; 1 Chitty Plead. 200; *Dixon v. Barclay*, 22 Ala. 370.

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In order to maintain the action of *trover* the plaintiff must have a property in the goods, alleged to be converted, absolute or qualified, with the immediate right of possession at the time of suit being instituted. This right is not possessed by a mortgagee until after default, or the law day, where a stipulation in the mortgage authorizes him to seize or take possession only after such date or event.—*Ellington v. Charleston*, 51 Ala. 166; *Herman on Chat. Mort.* § 71; *Hathaway v. Brayman*, (42 N. Y. 322), 11 Amer. Rep. 524; *Ring v. Neale*, (114 Mass. 111), 19 Amer. Rep. 316. The terms of the mortgage in this case expressly postponed the right of the mortgagee to take possession of the mortgaged property until the 15th day of September, 1879, which was after the conversion of the cotton by the defendants.

The mortgage in this case is dated January 22, 1879, and the cotton in controversy was not at that time either planted or growing. It was, therefore, the conveyance of a crop not *in esse*, but to be produced only in *futuro*. The decisions of this court uniformly hold that such a mortgage does not convey a legal but only an equitable title to the cotton, and that it will not support an action of *trover*, *detinue* or *trespass*. *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coots*, 65 Ala. 256, where the authorities are fully cited.

The judgment of the Circuit Court is reversed, and the cause remanded.

## Turner v. Flinn et al.

*Bill in Equity by Junior Mortgagee for Account, and for Marshalling Securities.*

1. *Answer; denials in sworn answer by two witnesses.*—A sworn answer, responsive to the charges in the bill, and denying them, is evidence for the defendant, which can be overturned only by the opposing testimony of two witnesses, or one witness with corroborating circumstances.

2. *Senior and junior mortgagees; breach of agreement between, no ground of equitable jurisdiction.*—When a senior and junior mortgagee, whose mortgages covered, in part, the same property, agreed that if the junior mortgagee would not advertise under his mortgage, the senior mortgagee would, after satisfying his debt, turn over the surplus of the proceeds of the sale of property which was mortgaged to him alone, to the junior mortgagee an action at law would lie for the breach of such an agreement, which furnishes no ground of equitable jurisdiction.

3. *Same; marshalling assets between.*—When mortgages, held by senior and junior incumbrancers, cover, in part, the same property, and the mortgagor is insolvent and the entire property is insufficient to pay both debts, the junior



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may compel the senior mortgagee to exhaust the fund on which he alone held a lien before resorting to that covered by both mortgages.

4. *Same; same.*—While in such a case the senior must do nothing to injure or embarrass the junior incumbrancer, the former is not required to become active; and where the senior mortgagee had, before the junior mortgagee filed his bill to assert this right, sold all the property covered by both mortgages, the doctrine of marshalling has no application.

### APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in equity filed on November 28, 1877, by Rebecca A. Turner against W. R. Flinn, Henry Jones, James W. Hardie and Julius T. Glaze. The bill alleged that Flinn & Jones were indebted to complainant in the sum of \$2,400, which was evidenced by a promissory note, and secured by a mortgage executed on October 18th, 1877; that on the 16th day of February, 1877, said Flinn & Jones had executed to James W. Hardie & Co., a firm composed of James W. Hardie and Julius T. Glaze, a mortgage on all the property covered by the mortgage to complainant, and which also covered the crop of cotton and corn grown on a certain plantation described in the bill; that an agreement was made between W. B. Jones, as agent for complainant, and Messrs. Hardie & Co. and Flinn and Jones, as to the sale of the cotton crop, which said agreement is set out in the opinion of the court. The facts of the cause, as well as the pleadings, are stated as fully as is necessary in the opinion of the court. The bill prayed for an account of the mortgage debt of Hardie & Co., and of the credits on it, and also prayed that Hardie & Co. should be compelled to "dispose of the property embraced in their mortgage so as to first apply the proceeds of the property embraced in their mortgage, and not embraced in the mortgage to complainant, or to sell all the property mortgaged to them, and account to complainant for the excess of the proceeds of sale after satisfying their said mortgage and all proper charges." The Chancellor dismissed the bill, and his decree is assigned as error.

R. W. WILLIAMSON, and WATTS & SONS, for appellant. (No brief on file).

GUNTER & BLAKEY, for appellees.—A court of equity has power to marshall assets so that a creditor having two securities shall not wantonly defeat another who has only one of these securities; but this is done by controlling the action of the mortgagees—directing the mode of the satisfaction of their debts. The court cannot revive, as to the debtor, a debt already extinguished. In this case Hardie & Co. had sold, in good faith, all the property except the cotton, on which

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they held a lien; their debt was still unsatisfied, and they were not required, *ex mero motu*, to take any particular course in selling the mortgaged property; they should have been notified or requested to sell in a particular way so as to save complainant's rights. It is too late after a sale, for the law appropriates the proceeds to the payment of the debt for the payment of which the power was exercised, and in this case the parties had themselves appropriated them. There was thus no room for the operation of the doctrine of marshalling securities between creditors.

STONE, J.—One phase of this case rests on an alleged agreement made between Henry Jones, representing Flinn & Jones, the mortgagors, J. W. Hardie for J. W. Hardie & Co., and W. B. Jones, acting as agent of Mrs. Turner, the appellant. The charges of the bill are that Hardie, who had a mortgage on the cotton, agreed with W. B. Jones that if the latter would not advertise under Mrs. Turner's mortgage, he, Hardie, would, after satisfying his own older mortgage, turn over to him for Mrs. Turner any surplus that might remain of the proceeds of the cotton; and that in violation of this agreement, he surrendered to Flinn & Jones twelve bales, the last of the cotton crop produced that year by Flinn & Jones. Mrs. Turner held no mortgage on the cotton, but her mortgage embraced other chattles which were also in the mortgage to Hardie. The bill charges that Henry Jones was present when this agreement was entered into, and assented to its terms. The bill calls for a sworn answer from the defendants, and both Hardie and Henry Jones answer on oath that there was no agreement to turn over to W. B. Jones any cotton, or proceeds of cotton, or any thing else not included in Mrs. Turner's mortgage. Three witnesses are examined—W. B. Jones, Henry Jones, and Hardie. The first named testifies that such agreement was made. The other two testify as they had answered, denying such agreement. This phase of the bill must fail, even if well averred, because the testimony is insufficient, under the rule, to overcome the denials in the answer. A sworn answer, responsive to the charges of the bill, and denying them, is evidence for the defendant, which can be overturned only by the opposing testimony of two witnesses, or *one* with corroborating circumstances.—1 Brick. Dig. 738, § 1466.

But there is another answer to this phase of the bill, equally fatal to the relief it seeks. If Hardie, upon a consideration deemed valuable in the law, made the agreement with Jones which the bill seeks to set up, it was only a simple contract to do an act, for the breach of which an action at law could

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be maintained. It does not contain one single ingredient of an equitable jurisdiction.

But it is sought to maintain the present bill, as a suit to have the securities marshalled between the different lien creditors. Hardie & Co. held the elder mortgage, and the debt, to secure which it was given, was past due when the mortgage was made to Mrs. Turner. Each mortgage, to some extent, conveyed the same property, while each conveyed property not embraced in the other. The cotton crop, probably the most valuable of all the chattels conveyed, was mortgaged to Hardie & Co., but not to Mrs. Turner. The mortgagors were insolvent, and the entire property conveyed by the two mortgages was insufficient to pay both debts. In this state of the case there can be no doubt that Mrs. Turner, if she moved in time, had the right to have Hardie first exhaust the fund on which he alone held a lien, so as to leave for Mrs. Turner a larger *residuum* of the property upon which each of them held a lien.—Story Eq. Ju. § 633. But this is an equitable doctrine—the creature of equity—called into exercise by, and for the benefit of the creditor who is to be profited by it. The fully secured creditor has no interest in the question, and is not required, of his own motion, to take any step to advance the interest of the junior incumbrancer. He must do nothing to injure or embarrass the junior incumbrancer, but he is not required to become active. Till the junior incumbrancer moves in the matter, the elder may do nothing. The debt to Hardie & Co. become due and in default, long before the cotton crop was gathered and prepared for market. Before the present bill was filed, and while much of the cotton remained ungathered, Hardie & Co. had so far foreclosed their mortgage as to sell all of the property on which they and Mrs. Turner each held a lien, had applied the proceeds, and also the proceeds of the cotton then gathered, as payments on the mortgage debt due from Flinn & Jones to them, and still left a balance of, say \$190, due them. When the present bill was filed, all the property mortgaged to Hardie & Co. and afterwards to Mrs. Turner, had thus been sold, and the proceeds appropriated, as payments on the debt to Hardie & Co.; and the mortgage debt to them was thus extinguished, less the said balance of \$190. Of the cotton crop, the proceeds had been applied in the same way, except a remnant of twelve bales. On these, as we have seen, Hardie & Co. held a lien, while Mrs. Turner had none. The lien of Hardie & Co. was only for the \$190—the *residue* of their debt having been paid. It results from these facts that there was nothing left, on which the doctrine of marshalling could operate. Nothing remained on which Mrs. Turner had



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a lien, and no two funds were left, which the Chancellor could marshal. He had no power to cancel the payments made to Hardie & Co. on their demand; and without doing that, there was no fund on which each mortgagee held a lien. The appellant can take nothing by her bill.

Affirmed.

## Cook, Adm'r, v. The Central Railroad and Banking Company of Georgia, and the Georgia Railroad and Banking Company.

### *Action to Recover Damages for Injuries, Resulting in Death of Person Walking on Railroad.*

1. *Contributory negligence; defense of vitiated when injury inflicted intentionally.*—When contributory negligence is relied on, as a defense to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome.

2. *Cases approved.*—The cases of *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621, and *Gothard v. The Alabama Great Southern R. R. Co.*, 67 Ala. 114, are approved on this point.

3. *Contributory negligence; when defense of vitiated, although injury not inflicted intentionally.*—When, in an action to recover damages for personal injuries, the defense of contributory negligence is relied on, the defendant is liable, although the plaintiff's negligence essentially co-operated to produce the injury, when it could have been averted by the exercise of reasonable care and prudence on the part of the defendant, or his servants, after discovering the danger in which the party injured stood.

4. *Case qualified or supplemented.*—The third head note in the case of *Gov't Street R. R. Co. v. Hanlon*, 53 Ala. 70, is qualified or supplemented by the doctrine settled in the cases cited above.

5. *Comparative negligence; doctrine of, does not prevail in this State.*—The doctrine of "comparative negligence" does not prevail in this State; and charges based on it are properly refused.

6. *Contributory negligence; when not invoked against person in danger.*—Contributory negligence is not charged upon one who suddenly acts wildly when peril comes upon him unwarned, and in the absence of any evidence throwing light on the matter, he will be presumed to have used that care and precaution which the law requires, and to which instinct would prompt him in saving his life.

7. *Negligence of person walking on railway, in avoiding danger, must be submitted to the jury.*—When a person, walking over a long trestle on a railway, let himself down under the ties to avoid being run over by an approaching train, but being unable to get upon the track again, fell and was killed, a charge which submitted to the jury the question of his negligence in attempting to cross the trestle, but which ignored the question of due caution in regaining his position, on which there was evidence, was misleading and properly refused.

8. *Engineer; duty of, as to stopping trains on discovering persons on railway track.*—Ordinarily, persons who walk on railway tracks are trespassers, and the

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engineer is not bound to stop or check his train on discovering a person on the track, at a place where he can readily get off and escape from danger, but where the trespasser does not appear to be apprised of the impending danger, or, from any cause, is unable to leave the track, the rule is otherwise.

9. *Cure; degree of required from railroad companies.*—The law demands of railroad companies, and their servants, only that degree of diligence which very careful and prudent persons take of their own affairs; infallibility is not required or expected.

10. *"Regular depot or stopping place;" what is not within the meaning of the statute, (Code, § 1699).*—A place, not on a public road where a railroad company was in the habit of stopping its trains, for the sole purpose of taking on or putting off passengers, who had notified those in charge of the trains to do so, and when such trains would also stop at other places for this purpose, is not a "regular depot or crossing," within the meaning of the statute (Code, § 1699), requiring the bell to be rung or the whistle blown within a quarter of a mile of such depot or crossing.

11. *Erroneous charge, to which neither party objects, should be refused.*—Courts must pronounce their own rulings, being guided alone by a sense of judicial duty, and when a written charge is requested by either party, which is erroneous, it should not be given, although the adversary party "withdraws all objection to it."

APPEAL from the City Court of Montgomery.

Heard before the Hon. JOHN A. MINNIS.

This was an action brought by James W. Cook, as administrator of the estate of Jacob Gunter, deceased, against the Central Railroad and Banking Company of Georgia and the Georgia Railroad and Banking Company, to recover damages for injuries inflicted on said Jacob Gunter, from which he died. On the trial the plaintiff proved that on April 1, 1878, Jacob Gunter, a weak and feeble old man, was walking along, and across, a trestle on defendants' railroad. This trestle was some fifteen feet in height, and seven hundred feet long, and was connected with the bridge over Pintlala Creek, which was about one hundred and fifty feet long, and just before said Gunter reached the end of the trestle a train came upon it, and in order to escape being run over by the cars, he let himself down between the ties and hung down by his hands until the train passed over him. He then tried to draw himself up again on the track, but could not do so, and fell to the ground, receiving injuries which caused his death. The engineer did not blow the whistle or ring the bell until just as the train passed over the place where the deceased was hanging, although the train had approached the trestle on a track which was a straight line for a half mile before reaching it, and although the said Gunter could easily have been seen by a person at any point on said straight line. The engineer, Blackmon, testified for the defendants, that a heavy down grade commenced at the point where the straight line began and continued to the bridge; that when the engine reached this straight line he shut off steam, and when he was about three thousand feet from the bridge and run-

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ning down grade he discovered a man on the trestle ; that he thought the man was so close to the embankment that he would get off before the train reached him ; that he did not blow the whistle or ring the bell, nor try to stop the train ; that when he came within two or three hundred feet of the bridge he "blew for brakes," and reversed his engine, but the velocity of the train was so great that although he used all the means in his power to stop it he was unable to do so until he reached the spot where Gunter was hanging, but to give him a chance to get back on the track as soon as possible, he "blew off brakes" and ran on to the next station. At the point where the straight line, spoken of above, commences, there was a crossing known as Cantelo's Crossing ; that it was the habit to stop at this crossing for the purpose of taking on or putting off any passenger who might want to get on or off there, and the person in charge of the trains would stop at other places for the same purpose, and trains only stopped at the crossing when a passenger wished to get on or off ; the witness also said that he did not blow the whistle within a quarter of a mile before reaching the crossing, but he did blow it when he got to the crossing. The conductor of the train, Lucas, testified that he had often seen men hang down on this trestle while the train passed over them, and then get back on the track and laugh at those on the train ; that he heard the signal for brakes some three or four hundred yards before they reached the bridge. The court was requested by the plaintiff to give the following written charge : "If the jury believe, from the evidence, that defendant's agents, in charge of said train, did see, or by the exercise of proper care, could have seen, plaintiff's intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop said train, and that their failure to stop said train necessitated his swinging down from the timbers to prevent being run over, and that his death occurred from injuries received in falling from said timbers, in his attempt to get up, after the train had passed, then the defendants are liable in the same degree and to the same extent as if the train had actually struck him and knocked him off." This charge the court refused to give, and the plaintiff excepted. The court then gave the charges marked, 1, 2, 3, 7, X, and Z, at the request of the defendants. The plaintiff separately excepted to the giving of each of these charges, which were as follows : 1. If the jury believe, from the evidence, that the plaintiff's intestate was without direct or implied license of defendants, walking along the railroad track of defendants, and while so walking along the railroad of defendants was killed by reason of the running of



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the cars of defendants on said track, that then the administrator of plaintiff can not recover for such death, unless the conduct of those in charge of the cars, after his presence on the track was observed, or could, with due and proper diligence, have been discovered, evinced wanton, reckless, or intentional mischief to plaintiff's intestate, or was lacking in that prudence which the most prudent men use in their own affairs. 2. That when one is observed by an engineer to be on the track of a railroad on which a train is running, the engineer is justified in supposing that he will use ordinary prudence in getting out of the way of the train, and there is no duty imposed on him, either in law or humanity, to check or stop the train, unless the circumstances show that the man is either unaware of his danger or is not in a situation to escape it. 3. That if the plaintiff's intestate was in fault in being on the track of defendants' road, and such fault contributed proximately to the death of plaintiff's intestate, that then the defendants can not be made liable for his death, unless the conduct of its agents, or servants, contributing proximately to his death, was after they observed, or could, with due care, have seen that he was on the track, reckless, wanton, or intentional. 7. The prudence which the most prudent men use in their own affairs is all that can be required of those in charge of trains of railroads; they are not required to be infallible. "Z." If the defendants were in the habit of taking up and putting off passengers at any point where it could conveniently be done, and was in the habit of stopping at a certain place when notified beforehand that some one wanted to get on or off there, and not otherwise; that then such place is not a "regular stopping place," in the terms of the statute read to you (Code, § 1699). "X." There is no duty to stop or check a train in motion because a man is on the track, unless the one in charge of the train sees, or could see, that he was in danger, and the duty of checking or stopping the train only arises when the danger is apparent. If, with proper vigilance, it appeared to the engineer, and if the engineer was prudent and skillful, that the plaintiff's intestate was at a place where he could readily get off, then the duty of checking or stopping the train only arose when the danger became apparent. The defendants then requested the court to give the following written charge, viz: "If the jury believe, from the evidence, that plaintiff's intestate was on defendants' said railroad track, without permission of defendants, and that when he was seen to be on the track, by defendants' agents, or could, with due care, have been seen, there was nothing wanton, reckless, or intentional on the part of defendants' agents, or servants, in the running or manage-

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ment of the train, that then the defendants are not liable for his death." This charge the court refused to give, whereupon the plaintiff announced to the court that he withdrew all objection to it, but the court refused to give it, and plaintiff excepted. The plaintiff then requested the court to give said charge, which had been first requested by the defendants, but the court again refused to give it, and the plaintiff again excepted. There was a verdict for the defendant. The giving, and the refusal to give, the charges, as stated above, are the errors assigned.

EDWIN F. JONES, for appellant.—The court erred in refusing to give the charge requested by the plaintiff, for it conformed with the principles laid down in *Tanner, Ex'r, v. L. & N. R. R. Co.*, 60 Ala. 621. That case holds that the duty to stop a train, when perceiving a person on the track, is lifted from the employees of the company only when the person seen on the track is an adult, and shows by his actions that he is aware of its approach and is using the proper efforts to get out of its way; that if the person seen on the track was on a high embankment, or in a deep cut, it is the duty of the engineer to *promptly* use all means in his power to stop. In this case, the person killed was in just such a place. No attempt to stop the train was made until long after he was discovered on the track. The engineer saw the deceased, but thought he would get off before the train reached him, or, in other words, "took the chances" of killing him. If the person is in such a place as to render it "*doubtful* whether he could get beyond it before the train would overtake him, the train officers being presumed to know the topography of the road, should at once take measures to avoid the danger." *Tanner v. L. & N. R. R. Co.*, *supra*. Yet the court charged the jury that although the defendants' agents may have been guilty of negligence, such as forced the plaintiff's intestate to make the attempt to hang down from the bridge, to escape certain death, the railroad company is absolved from liability for his death, which resulted therefrom. The charges withdrew from the jury the question whether hanging down from the bridge was a prudent act, under all the circumstances surrounding the deceased when he made the attempt. The case of *Tanner v. L. & N. R. R. Co.*, *supra*, has been approved in *Sullivan v. S. & N. R. R.*, 59 Ala. 272; *Shearer v. Savannah & Memphis R. R.*, 58 Ala. 672. Charge No. 3, given at the request of the defendants, is erroneous, for it relieves the company from liability if the conduct of its servants was not *reckless, wanton* or *intentional*. It may have been wanting in that high degree of skill and carefulness which the law re-

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quires of railroad employees, but this, according to the charge, would make no difference. The engineer might be careless, or incompetent, but if his conduct was not *wanton*, *reckless* or *intentional*, the company is not liable. Such is not the rule, for a lack of prudence is as fatal to the defense of contributory negligence as such wanton, reckless or intentional misconduct. The 2nd charge was erroneous, for it allowed the engineer to judge whether the deceased could have gotten off the track, while the law is, that if it was *doubtful*, the duty to stop the train immediately arose. The deceased, from the time the engineer first discovered him, was at a place where he could not get off. A station at which any one could get on or off the train, such as was the stopping place mentioned in this case, comes within the statute (Code, § 1699), which requires the engineer to "blow the whistle, at least one-fourth of a mile before reaching any public road crossing, or any regular depot, or stopping place on such road." The question as to whether a party has the right to waive objections to a charge requested by his adversary, and to have the same given, is submitted to the court without argument. I have found no adjudication on this subject.

HENRY C. SEMPLE, for appellees.—The charge refused to plaintiff was properly refused. It withdrew from the jury all consideration of the facts constituting and involving the question as to whether the duty of stopping the train had arisen. *Non constat*, but that in the situation in which the engineer stood it was apparent to him that deceased was in a situation from which he could, without danger, get off the trestle. Looking through the bridge, or over it, as he descended, he seemed to be near the end of the trestle. He could see and hear the approaching train. Men frequently trespassed on the road by getting on the trestle and walking over it, and when the train approached hung down under it in jest and fun, and laughed as the train passed over them. The engineer could not be reproached for not discovering that he was old and feeble, at the distance of several hundred yards. It assumed negligence from a part of the facts, when others were in evidence tending to contradict the idea, not noticed by the charge, and was properly refused. Charges one and two, given for defendants, comply exactly with the rule of duty laid down by the court in *Tanner, Executor, v. L. & N. A. R. R. Co.*, 60 Ala. 621. And charge three is the same when we consider that *reckless* is the reverse merely of *lawful*, and that the sense of the charge is the same as if it had used the words, "wanting in due and proper care." The charge "Z." was fully sustained by the evidence noticed therein. The



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words of the statute are, "public road crossing, or *regular* depot, or stopping place on railroad." It is not contended that there was any evidence to show it was a "public road crossing," but it is insisted that because the engineer could stop at that place to take up or put off passengers, whenever *notified* that any one wanted to get on or off there, that this constituted it a "*regular* stopping place." This necessarily blots out the word "*regular*," which involves the idea of a rule to stop without notice, and makes a *rule* of an *exception*. As to the error of refusal to give a charge which defendants had asked, and to which plaintiff withdrew all objection, it is manifest that if error, it is one of which defendant alone can complain.

SOMERVILLE, J.—In *Tanner's Ex'r v. The Louisville & Nashville R. R. Co.* 60 Ala. 621, and *Gothard v. The Alabama Great Southern R. R. Co.* 67 Ala. 114, this court has stated the doctrine of contributory negligence applicable to injuries to the person, produced by the want of proper care on the part of the servants and agents of railroad companies. Without reiterating in detail the principles there enunciated, we are satisfied to re-affirm them so far as they are germane to the points arising and necessary to be considered in this case.

In the former case, the principle, as stated by STONE, J., is indisputably correct, that when an injury is perpetrated by a defendant either wantonly, recklessly, or intentionally, the defense of plaintiff's contributory negligence is thereby overcome and vitiated. But we do not consider that such misconduct on the part of a defendant is necessary in order to establish his liability for such injury, even where the negligence of the plaintiff has essentially co-operated to produce the damage which is the *gravamen* of the action. The third head note in the case of the *Govt. St. R. R. Co. v. Hanlon*, 53 Ala. 70, must be considered as qualified or supplemented by the doctrine settled in the above cases, which makes the liability of the defendant, in such cases, turn upon the question as to whether or not the servants or agents of the company could, by the exercise of reasonable care and prudence, have averted the injury.

Tested by these principles, charge numbered three, given by the Circuit Court on request of the appellee, was erroneous. The doctrine announced in *Railroad v. Hetherington*, 83 Ill. 510, and other similar adjudications in that State, upon which these charges seem to have been based, does not prevail under the decisions of this court. The principle of comparative negligence, from which it originates, has been discarded by these decisions.

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It is a most difficult and perplexing question as to what consequences of a negligent act, a wrong-doer can be held responsible for in damages. It was well pronounced by Shaw, C. J., in *Marble v. Worcester*, 4 Gray, 395, 387, to be frequently, in its relation to the whole doctrine of causation, a matter of "profound difficulty, even if it may not be said of mystery." It is obvious, however, that the injury must not be too remote, as being the result of secondary causes. And the damage sustained must flow naturally, legally and with sufficient directions from the alleged injury. The reason given by Lord Bacon is: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."—Bac. Maxims, Reg. 1.

It is insisted by appellant, that if by the negligent failure of defendant to stop the train before it reached deceased on the trestle upon which he was walking, he was compelled to swing down by his arms from the timbers in order to escape danger, and, in his attempt to recover his position after the train passed over him, he fell to the ground and thereby sustained injuries terminating in his loss of life, the defendant would be liable to the same extent as if he had been killed by direct collision with the engine or train. The evidence shows that the deceased had, as stated in the bill of exceptions, "let himself down between the ties (on the trestle), and endeavored to hang down by his hands until the train should pass over him; that the said train did pass over him and he was unable to draw himself up on said bridge, and fell to the ground, a distance of about fifteen feet, and died in two or three days thereafter from the effects of injuries sustained by the fall." The charge requested to be given at the instance of appellant, and refused by the court, ignored the question of due care on the part of deceased in swinging down from the bridge and regaining his position after the train passed over the trestle or bridge, beneath which he had taken refuge.

It is true that a person, under such perilous circumstance, will be presumed, in the absence of any evidence throwing light upon the matter, to have observed that care and precaution which the law requires, as instinct would prompt him to due diligence in saving his life.—*Railroad Co. v. Weber*, 76 Penn. St. 157, (18 Amer. Rep. 407). And we may say, as a general rule, too, that "a person is not chargeable with contributory negligence, who, when unwarned peril comes on him suddenly, acts wildly and madly. For persons in great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for

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them, and leaves the circumstances of their conduct to the jury."—Wharton Law Neg. § 304; *Buell v. Railroad Co.* 31 N. Y. 314; *Railroad Co. v. Yarwood*, 17 Ill. 509. The question of decedent's negligence in undertaking to cross so long a trestle, when his means of escape was so hazardous, was properly submitted to the jury. And so likewise ought the question of his exercising due caution in attempting to recover his position, upon which there was evidence tending to throw some light. This was withdrawn from their consideration by the charge in question. It was, for this reason, misleading, and its refusal was not error—*Railroad Co. v. Hetherington*, 83 Ill. 510; *Thrash v. Bennett*, 57 Ala. 156; *Ham-mil v. Brown*, 60 Ala. 499.

The safety of the traveling public demands that the right of way of a railroad company should be unobstructed, and persons ordinarily who walk along or upon such ways are trespassers. In *Railroad Co. v. Godfrey*, 71 Ill. 500, the court said: "The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be, for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own convenience as a footway in reaching his home. . . . There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by other individuals." The engineer is under no duty to stop or check his train when one is observed on the track of the road, where he can step readily aside, or otherwise reasonably escape from danger. "If he were required to check the train at every such occurrence, it would become an intolerable grievance."—1 Redf. on Railways, § 133, note. But the duty is otherwise where the trespasser does not appear to be apprised of the impending danger, or, from any cause, is unable to leave the track.—*Tanner v. Railroad Co.* 60 Ala. 621, 640.

There was no error in giving charge numbered one and two as requested by defendant, as it harmonized with these principles. The seventh charge was obviously correct, under the uniform rulings of this court in all cases where the point presented has been raised. The law exacts of railroad companies, and their servant, only that degree of diligence which very careful and prudent persons take of their own affairs. Infallibility is neither expected, nor required.—*Gothard v. Alabama Great So. R. R. Co.* 67 Ala. 114.

Section 1699 of the Code, (1876) requires engineers or other persons having the control of railroad locomotives or



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trains "to blow the whistle or ring the bell, at least one-fourth of a mile before reaching any public crossing, or any regular depot or stopping place on such road," and to so continue until such destination is reached or passed. The evidence shows that Cantelo's Crossing was not a public road, and that it was the habit of the company to stop at this point only for the purpose of taking on or putting off any passenger who so desired, and that those in charge of trains would stop at other places for the same purpose. This was not a "regular depot or stopping place," within the contemplation of the statute.

When a defendant or plaintiff requests a charge in writing and it is refused by the court, it avails nothing for the opposite party to "withdraw all objections" to it. The court must pronounce its own rulings, being guided alone by a sense of judicial duty, which regards the correctness or incorrectness of the legal proposition submitted, as gauged by the law. No charge should be given which is erroneous, though favored by both litigants, or their counsel. The plaintiff, however, had a right to request this rejected charge in the same manner that he could any other one which was in writing, as required by the statute. The charge numbered four in the record, concerning which these proceedings were had, was incorrect under the principles above discussed, and was properly refused.

The judgment of the Circuit Court is reversed, and the cause is remanded.

## Cromelin v. McCauley et al.

### *Bill in Equity to set aside Chancery Decree, for Fraud.*

1. *Equitable relief against fraudulent judgment or decree.*—A court of equity has undoubted jurisdiction to grant relief against fraud in judicial proceedings; but the fraud must have been practiced in procuring the rendition of the judgment or decree, or in a subsequent alteration thereof, and it must be clearly established by positive proof.

2. *Same.*—If the judgment or decree assailed was rendered without the service of process, and without the knowledge of the defendant, the rule now seems to be established, that a court of equity will not set it aside unless it is made to appear that the "result will be other or different from that already reached."

3. *Proof of fraud.*—Courts will not strive to force conclusions of fraud; and if the facts and circumstances in evidence are fairly susceptible of an honest intent, that construction will be placed upon them.

4. *Fraudulent foreclosure of mortgage.*—A decree foreclosing a mortgage will not be set aside, at the instance of a creditor of the mortgagor, because of a

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fraudulent intent on the part of the mortgagor (who was the defendant in the decree), unless the mortgagee and complainant had knowledge of such fraudulent intent, participated in it collusively, or had knowledge of facts sufficient to charge him with notice.

5. *Validity of mortgage, assailed for fraud.*—A mortgage will not be held fraudulent at the instance of creditors, merely because it was given to secure an antecedent debt, and the mortgagee knew that the mortgagor was financially embarrassed.

APPEAL from the Chancery Court of Lee.

Heard before Hon. N. S. GRAHAM.

The bill in this case was filed on the 2d May, 1872, by George Cromelin, a citizen of Philadelphia, as a judgment creditor of Henry McCauley, against the said McCauley, and against the administrators of the estate of Thomas Brassill, deceased, and against the persons composing the firm of Viti Brothers, a mercantile partnership doing business in Philadelphia. Its object was to set aside, on the ground of fraud, a decree rendered by the Chancery Court of said county, on the 19th November, 1868, foreclosing a mortgage, under a bill filed by said Brassill against McCauley; also, to set aside a sale made under said decree, and a conveyance to said Brassill's administrator and Viti Brothers jointly as the purchasers, and to enjoin an action of ejectment which they had brought against McCauley to recover the land. The complainant's judgment against McCauley was rendered by the United States District Court at Montgomery, on the 30th May, 1867; and an execution having been issued on this judgment, and levied on the lands conveyed by the mortgage, they were regularly sold by the marshal on the 4th November, 1867, the complainant becoming the purchaser at the sale and receiving a conveyance from the marshal. The complainant afterwards brought an action of ejectment against McCauley, in the said District Court, and recovered a judgment for the land; but McCauley was suffered to remain in possession, under a written agreement to pay rent, and was still in possession when the bill in this case was filed.

The mortgage executed by McCauley to Brassill, which was dated the 13th May, 1867, and duly recorded on the 29th May, 1867, recited as its consideration an indebtedness by McCauley to Brassill, as evidenced by two promissory notes, one for \$1,250, dated the 12th January, 1866, and the other for \$600, dated the 16th April, 1867; and that said Brassill "has this day become security for the said Henry McCauley, for a further sum of \$3,200;" and it conveyed the lands here in controversy, with other property, as security for said debts, but without power of sale. On the 20th May, 1868, a bill in equity was filed by said Brassill, or in his name, for the fore-

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closure of this mortgage. McCauley was made a defendant to the bill, and filed an answer under oath, admitting all its allegations. Cromelin, the complainant in this case, was also made a defendant, under an allegation that he claimed some interest in the mortgaged property ; and affidavit of his non-residence having been made, an order of publication was entered against him on the 1st June, 1868, on which a decree *pro confesso* was taken on the 9th November, 1868, as follows: "It being made to appear to the register in chancery, that publication was made, in the terms of law, against George Cromelin, one of the defendants to the above cause, and that more than thirty days have elapsed since the perfection thereof ; and it further appearing that the said George Cromelin has failed to plead, answer, or demur, as thereby required; it is therefore ordered, adjudged, and decreed, that the bill of complaint in said cause be, and the same is hereby, taken as confessed as to the said George Cromelin." At the same term (November, 1868), the death of Brassill was suggested, and the suit was revived in the name of John R. Hubbard, as his administrator ; and the cause being submitted for final decree on pleadings and proof, the Chancellor rendered a decree foreclosing the mortgage, ascertaining (without a reference) the amount due to be \$5,253, and ordering a sale of the mortgaged property by the register, unless this sum, with interest, was paid within thirty days. The register sold the property under this decree, on the 1st Monday in February, 1869, and reported that Felix McArdle was the purchaser at the sale, at the price of \$5,004 ; that the complainant had acknowledged the receipt of the sum bid, and that the costs had been paid. The register's report was confirmed, without objection or exception.

Brassill was a citizen of Georgia, and McArdle was the administrator of his estate by appointment in that State, the administration of Hubbard in this State being ancillary. The register's deed to McArdle, as the purchaser at the sale, conveyed the land to him as the administrator of said Brassill's estate, and to Viti Brothers, jointly ; and it seems to have been an admitted fact, that their respective interests in the land was in proportion to the amount of the debts which they held, or claimed to hold, against McCauley. The bill in this case alleged these facts, and purported to make a copy of the deed on exhibit, marked "Exhibit F.;" but the exhibit is not set out in the transcript, nor is it included with the other exhibits in the note of submission. The answers, however, admitted the allegations of the bill, as to the contents of the deed.

The debt of McCauley to Viti Brothers was contracted in



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1860, or prior to that time, and amounted to over \$6,000. The debt for \$3,200, for which, as recited in the mortgage, Brassill had become bound as surety for McCauley, consisted of two notes, each for \$1,600, which McCauley had executed, payable to said Viti Brothers, and which he intended to use in settlement and compromise of his said debt to them; but the bill alleged that no compromise had been effected, and the execution of the notes was not known to Viti Brothers, when the mortgage was executed; that after the execution of the mortgage, and before the rendition of the decree of foreclosure, McCauley went to Philadelphia, and succeeded in effecting a compromise with them on the terms proposed; and the mortgage was foreclosed, as above stated, for the joint benefit of Viti Brothers and Brassill's estate, in proportion to the amount of their respective debts. The bill alleged that these several transactions were fraudulent in law and in fact, and were intended to defeat the rights of the complainant as a creditor of said McCauley; that Viti Brothers had no knowledge of the execution of the notes by McCauley, with Brassill as surety, until informed by McCauley during his subsequent visit to Philadelphia, and that they accepted the notes and mortgage with full knowledge of the complainant's rights. Viti Brothers, in their answer to the bill, admitted their knowledge of McCauley's insolvency when they compromised their debt with him, but denied all knowledge of the complainant's debt; and they alleged that they had agreed to compromise their debt, at fifty cents on the dollar, and considered the compromise accepted and settled, before McCauley's visit to Philadelphia, though they had not received his notes, and did not know who was surety on them. In their depositions they stated the same facts in substance, and appended as exhibits several letters showing their correspondence with McCauley relative to the compromise.

On final hearing, on pleadings and proof, the Chancellor dismissed the bill, but without stating any reasons for his decision; and his decree is now assigned as error.

BRAGG & THORINGTON, for the appellant.—Fraud in a court of equity, includes all acts or omissions which involve a breach of any legal or equitable duty, trust, or confidence, justly reposed, by which another is injured, or an undue advantage is taken of him. It is not limited to those acts which will avoid a deed at law, or on which a jury will be instructed to find against the validity of a conveyance. A court of equity looks to the substance, rather than to matters of form; and will not allow any machinery or contrivance, though it

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may attain the dignity of a judgment or decree, to consummate and perfect a fraud on the rights of third persons. And in the investigation of questions of fraud, a court of equity is not confined by the strict rules which govern courts of law, but acts upon principles and presumptions peculiar to itself. These general principles, applicable to all cases of fraud, are stated as elementary principles, and are recognized by decisions of this court.—Story's Equity, vol. 1, §§ 187-90; Kerr on Fraud and Mistake, 44-46; *Kennedy v. Kennedy*, 2 Ala. 592-6; *Snodgrass v. Br. Bank*, 25 Ala. 174; *Martin v. Smith*, 4 Bank. Reg. 83; *Reese v. Kirk*, 29 Ala. 410. An application of these principles to the facts of this case, as established by the pleadings and evidence, clearly shows error in the Chancellor's decree. The complainant's debts was not only admitted, but was conclusively established by judgment at law. Viti Brothers, old creditors, had refused to compromise their claim, except for cash; and they had no knowledge or notice of the notes and mortgage for their benefit until McCauley's visit to Philadelphia, after the execution of the notes and mortgage. They admit their knowledge of his insolvency, and it is immaterial whether they had knowledge of the particular debt due to the complainant, which had been reduced to judgment before their acceptance of the compromise effected by the notes and mortgage; and it is a fair inference from the facts in evidence, that their acceptance of the notes and mortgage, in compromise of their claim, was induced by notice of the complainant's judgment, when communicated by McCauley during his personal visit. McCauley, the debtor, was the chief actor in all the transactions and proceedings here assailed, and he had full knowledge of all the facts. He conceived and perfected the plot for the execution of the notes and mortgage, in fraud of the complainant's legal rights; and admitted under oath the facts alleged in the bill for foreclosure by Brassill, although he knew that Brassill was not entitled to a foreclosure, the security debt not having been paid, and one of the notes not being due at that time.—*Whitaker v. DeGraffenreid*, 6 Ala. 303; *Singleton v. Gayle*, 8 Port. 274. The decree should be set aside, independent of the question of actual fraud, because Cromelin had no notice of the suit, and the decree is constructively fraudulent as against him.—1 Story's Equity, § 438; Story's Eq. Pl. § 427; *Secor v. Brooks*, 8 Ala. 500; *Crafts v. Dexter*, 8 Ala. 767. The bill alleges want of notice, and is sworn to; and the decree *pro confesso*, without any other evidence, does not overcome the burden of proof.—Rule 29, Rev. Code, 827; 31 Ala. 192; 11 Ala. 668; 23 Ala. 797; 16 Ala. 233; 17 Ala. 738; 5 Ala. 173. Even if the decree *pro confesso* had been regularly entered,

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Cromelin would not be concluded, because he did not discover the fraud until after the termination of the foreclosure suit. Kerr on Fraud and Mistake, 293-4, 352; Story's Eq. Pl. § 426, note; 3 Sandf. Ch. 135; 2 P. Wms. 73; 1 Vesey, sr. 383; Willard's Equity, 160; 1 Madd. Chan. Pr. 236-7.

W. H. BARNES, *contra*.—The bill cannot be supported as a bill of review, because such a bill was barred by the statute of limitations.—Code, § 3843. It can only be supported as an original bill to impeach a decree on the ground of fraud; and to sustain such a bill, the rule requires proof of actual, positive fraud in the rendition or procurement of the decree. Kerr on Fraud and Mistake, 353; *Patch v. Ward*, L. R. 3 Ch. App. 203. Nor will a decree be set aside on the ground of fraud, unless it appears that a different result will be attained on another hearing of the cause.—Freeman on Judgments, 420, § 498; 20 Iowa, 229; *Gregory v. Ford*, 14 Cal. 138; *Fowler v. Lee*, 10 Gill & J. 363; *Piggott v. Addicks*, 3 G. Greene, 427; *Crawford v. White*, 17 Iowa, 560. The record shows that the complainant had knowledge of the material facts on which he now relies, before the expiration of the period within which he might have filed a bill of review, or might have sued out an appeal; and he cannot now attack the decree on those grounds. As to the other matters on which the complainant relies, he fails to show any ground on which he could have resisted the rendition of the original decree. Fraud on the part of McCauley, the debtor, in which Viti Brothers did not participate, and of which they are not even proved to have been cognizant, cannot affect their rights. See *Crawford v. Kirksey*, 55 Ala. 282, and numerous decisions of this court. Fraud will never be presumed, when the facts may consist with honesty and good intentions.—*Steele v. Kinkle & Lehn*, 3 Ala. 352; *Smith v. Br. Bank*, 21 Ala. 125; *Insurance Co. v. Pettway*, 24 Ala. 544.

SOMERVILLE, J.—This bill is filed for the purpose of vacating and setting aside a final decree of the Chancery Court of Lee county, and a sale of land made under it, on the alleged ground of fraud. That a court of equity possesses jurisdiction to relieve against fraud in judicial proceedings, is everywhere a universally recognized principle. The judgment or decree against which relief is invoked, however, must have been procured by fraud, either in its original rendition, or by a subsequent fraudulent alteration; and this fraud must, in a sense, be shown to be actual and positive. When this is clearly established by satisfactory proof, it is honorable to our system of equity jurisprudence, that such infection of



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fraud is made to vitiate every transaction, and the solemn judgments of courts are no exception to the salutary rule. Freeman on Judgments, §§ 489-490; *Munn v. Worrell*, 16 Barb. 221; *Ogden v. Larrabee*, 57 Ill. 389; Kerr on Fraud & Mistake, pp. 352-3; *Gelatian v. Erwin*, 1 Hopk. 48; *Barnesly v. Powell*, 1 Ves. 120, 285.

If the judgment or decree assailed has been rendered, even without the service of process, and without the knowledge of the defendant, the better established rule now seems to be, that a court of equity will not interfere to set it aside, unless it is made to appear that the "result will be other or different from that already reached."—Freeman on Judg. § 498; *Taggart v. Wood*, 20 Iowa, 236.

Courts will not strive either to force conclusions of fraud; and if the circumstances and facts in evidence are fairly susceptible of an honest intent, that construction will be placed upon them.—*Life Ins. Co. v. Pettway*, 24 Ala. 544.

Nor is it sufficient, that the mortgagor, or the defendant in the decree of foreclosure, entertained a fraudulent intent, if the mortgagee and complainant did not have knowledge of, or participate in it collusively, or have knowledge of facts sufficient to charge him with notice of such illegal intent. *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221.

The evidence in this case shows, that neither Brassill nor the Viti Brothers knew of the existence of the appellant Cromelin's claim against McCauley, at the time of their transaction with the latter. The facts that McCauley was financially embarrassed, and that this was known to them, and that the security taken by them was for an antecedent debt, would have been no legal ground of defense, even if presented as such in the original suit.—*Crawford v. Kirksey*, 55 Ala. 282. There are badges of fraud, and circumstances of suspicion, disclosed in the evidence; but these are not sufficient to satisfy us that the decree of the Chancellor was not proper and free from error. It is therefore affirmed.

STONE, J., not sitting.

[Goldthwaite v. National Bank.]

## Goldthwaite v. National Bank.

*Bill in Equity to establish Equitable Set-Off against Judgment.*

1. *Set-off; what demands are available at law.*—A cross demand, to be available as a set-off at law, must be such as would support an independent action at law by the defendant, at the commencement of the suit; hence, a payment of his principal's debt by the surety, after the commencement of suit against him on a debt due to his principal, is not available as a set-off in the action.

2. *Same, as against assignee of note.*—As against the assignee or holder of a promissory note, suing the maker, the doctrine of set-off has never been carried further than to put him in the place of the payee, or party having the beneficial interest; and a set-off in favor of the maker, against an intermediate holder, has been uniformly disallowed, in the absence of an agreement founded on new consideration, between the maker and such intermediate holder.

3. *Equitable set-off, on ground of insolvency.*—In the absence of all intervening equities, courts of equity put the same construction on statutes of set-off as do courts of law. Insolvency is recognized as a ground for the allowance of a set-off in equity, when it would not be allowed at law, but it is only the insolvency of the original creditor against whom the claim is asserted; and while the assignee of non-negotiable paper takes it subject to all equities to which it was subject in the hands of the assignor, this means only the equities between the original parties, and does not include equities which may arise between other parties in the course of its transfer.

APPEAL from the Chancery Court of Montgomery.

Heard before Hon. H. AUSTILL.

The bill in this case was filed on the 20th December, 1875, by George Goldthwaite, against the First National Bank of Montgomery; and sought to enjoin, and to establish an equitable set-off against a judgment, which the defendant had recovered against the complainant, in the City Court of Montgomery, on the 11th December, 1875, for the sum of \$4,326.27, besides costs. The action at law, in which the judgment was rendered, was commenced on the 3d December, 1874, and was founded on said Goldthwaite's promissory note, or obligation, dated Montgomery, February 16th, 1871, and in the following words: "Due Barnett, Micou & Co., a copartnership composed of Thos. M. Barnett, Nicholas D. Barnett, and Benj. H. Micou, twelve thousand, five hundred and fifty-seven 33-100 dollars (\$12,557.33), with interest from 1st January, 1871. This obligation is for a settlement had this day, for money advanced in June, 1869, to pay for \$15,000 of the capital stock of the Tallassee Manufacturing Company Number One, and now held in my name. To secure the payment of above amount, I hereby authorize said Barnett, Micou & Co. to apply any dividends which may accrue on said stock, to

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the payment of this obligation ; also, to pledge said stock to the payment of above obligation." Indorsed on this obligation were several credits for partial payments, amounting to \$6,000, dated May 27, and July 2, 1873, and a release of fifty shares of the stock " in consideration of certain credits as dividends received on the within obligation, and certain other credits entered on back of said note, said release to date from 1st July, 1873 ;" which release was signed by said Barnett, Micou & Co.

The bill sought to establish, as an equitable set-off against this judgment, certain payments made by the complainant, as accommodation indorser for the Tallassee Manufacturing Company, on several bills of exchange. The bills were seven in number ; were drawn by the said corporation, on Barnett, Micou & Co., by whom they were accepted ; were drawn and indorsed on the 27th November, 1873, and matured on different days during the months of January, February, and March, 1874. The payments made by the complainant on these bills, amounting to about \$2,500, were made in January, February, and March, 1875. The bill alleged that the complainant, " on or about the 15th June, 1869, subscribed for and purchased one hundred and fifty shares of the capital stock of said Tallassee Manufacturing Company, amounting in the aggregate to \$15,000 ; that afterwards, on or about the 16th February, 1871, a settlement was made of his liability for said stock, when, after allowing him credits for the dividends declared on said stock after his purchase, and other credits, in full settlement of the balance due from him for said stock, he executed and delivered his obligation," above set out, a copy of which was made an exhibit to the bill ; " that said obligation was in fact taken on account of said Tallassee Manufacturing Company, and sundry payments thereon were made by complainant to said company, and sundry dividends on said stock were credited thereon ; that said obligation, shortly after its execution, was transferred to said company, and was held and owned by said company until, as complainant has since learned, the 5th November, 1873 ;" that he indorsed the bills of exchange, on the 27th November, 1873, " for the accommodation of said company, and without any other consideration ; that said company was insolvent on said 27th November, 1875, when complainant so indorsed said bills for its accommodation, and has so continued ever since ; that at the time complainant so indorsed said bills, as aforesaid, no notice had been given to him, or to any person authorized to receive such notice, that his said obligation had been transferred by said company, but he then believed that said company still held said obligation, and if any transfer



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thereof had then been made by said company, complainant was not then informed, and was wholly ignorant of the same;" and that the defendant, in its action at law on his obligation, refused to allow him any credit or set-off on account of the payments which he had been compelled to make on account of his liability as accommodation indorser of said bills of exchange.

The defendant answered the bill, admitting that the complainant subscribed for and purchased the stock from said corporation as alleged, but alleging that he executed his notes for the purchase-money payable, not to the company, but to Barnett, Micou & Co., and, on subsequent settlement with said firm, executed his obligation payable to them, as shown by the exhibit to the bill; that this obligation was given for his indebtedness to said partnership, and any payments or credits made or allowed thereon were made to said partnership and credited by it, and not to or by said company; denied that the company held or owned said obligation prior to November 5th, 1873, when it was transferred to the defendant, for valuable consideration, by Benj. H. Micou; and alleged that the defendant, at the time of said transfer, "had no notice of any defenses or equities then existing between the parties to said obligation, or any defects in said obligation, and none then existed, so far as this defendant knows, has been informed, or believes."

The Chancellor overruled a demurrer to the bill for want of equity, but dismissed the bill on final hearing on pleadings and proof; and his decree is now assigned as error.

TROY & TOMPKINS, for appellant.—The bills of exchange which were indorsed by Goldthwaite for the accommodation of the Tallassee Manufacturing Company, and which were afterwards paid by him, the amount so paid being now asserted as an equitable set-off against the judgment at law, were so indorsed by him on the 27th November, 1873; and he became a creditor of the corporation from that time, and had a right to retain a debt or fund in his hands, as indemnity against his liability, on his principal becoming insolvent. *Railroad Co. v. Rhodes*, 8 Ala. 217; *Ex parte Metcalfe*, 11 Vesey, 404; *Chitty on Bills*, § 746, note n; *Feazle v. Dillard*, 8 Leigh, 30; *Battle v. Hart*, 2 Dev. Eq. 31. Although Goldthwaite's note, on which the judgment was rendered, was assigned to the First National Bank prior to his accommodation indorsement of the bills; yet he had no notice of the assignment until after he had incurred that liability, and his right of set-off was not affected until he had notice of the assignment.—*Wray's Adm'r v. Furniss*, 27 Ala. 471; *Carroll*

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*v. Malone*, 28 Ala. 521; *Clopton v. Morris*, 6 Leigh, 278. The right to establish the set-off, then, depends upon the insolvency of the corporation when the liability as accommodation indorser was assumed, and the want of notice of the assignment at that time; and there is no controversy as to either of these facts. The effect of these admitted facts can not be avoided, on the ground that the insolvent corporation was only an intermediate holder of the note; because, in the first place, the evidence clearly shows that the corporation was, in fact, the real owner of the note all the time; and, in the second place, because the bank received the note as collateral security for pre-existing debts of the corporation. As to such *choses* in action, the rule is well settled, that the assignee takes them subject to all the equities and rights which the debtor has against the immediate assignor at the time of the assignment, or, rather, at the time notice of the assignment is given.—*Colyer v. Craig & Smith*, 11 B. Monroe, 73. The note was given to Micou, who was the president of the manufacturing corporation, for the purchase of stock in the corporation; and it was taken payable to Barnett, Micou & Co., of which firm Micou was an active, managing member. In what business that firm was engaged, does not appear; but it is shown by the testimony of N. D. Barnett, a partner, that they were not engaged in loaning or advancing money; and there is no proof that Micou, as president, had any authority to transfer the note, or the claim of the corporation for the purchase-money of the stock, to himself individually, or to the firm of which he was a partner, and no such power can be implied from his position as president of such a corporation; and there is no proof that the corporation ever ratified his act, or was even informed or notified of it. Under this state of facts, the note must be regarded as the property of the corporation, from the time it was given, and the corporation might have maintained an action on it.—*Andrews & Brothers v. Jones*, 10 Ala. 460.

D. CLOPTON, *contra*.—The general rules of set-off are the same in equity as at law.—*Waterman on Set-off*, 416, note, 427; *McKinley v. Winston*, 19 Ala. 301; *French v. Garner*, 7 Porter, 554. The principle is settled, that the maker of a note can not set off a demand against an intermediate beneficial holder, when the note is in the hands of a subsequent assignee.—*Stocking v. Toulmin*, 3 Stew. & P. 35; *Kennedy v. Manship*, 1 Ala. 43; *Pitts v. Shortridge*, 7 Ala. 494; *Sykes v. Lewis*, 17 Ala. 265; *McKenzie v. Hunt & Andrews*, 32 Ala. 496. Under the facts of this case, the Tallassee Manufacturing Company can not be considered in any other light than as

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an intermediate beneficial holder ; and neither the time when its interest was acquired by transfer from Barnett, Micou & Co., nor Micou's authority to make or to accept the transfer is shown. Goldthwaite's original note was given in June, 1869, for the price of stock purchased from or through Barnett, Micou & Co., to whom it was made payable, and who were charged with the amount on the books of the company. No ownership of this note, or interest in it, was ever vested in the corporation, or asserted by it ; and when the note was given in February, 1871, on which the judgment was rendered, it was given on settlement of the accounts between Goldthwaite and Barnett, Micou & Co.; being made payable to that firm, and giving them authority to apply the dividends of stock to its payment, the stock itself being also pledged. This note was never transferred to the company until after July, 1873, and probably not until the transfer to the bank. Insolvency is an admitted ground of equitable set-off ; but the complainant does not bring himself within the rule established by the decisions of this court. The bill alleges that the corporation was insolvent on the 27th November, 1873, when the complainant indorsed the bills for its accommodation ; but this can not be construed as an averment that it was insolvent on the 4th November, 1873, when the note was transferred to the bank ; nor is there any averment that the complainant, in indorsing the bills, relied on his existing indebtedness as protection against the liability thereby incurred. If the company was solvent when the liability as accommodation indorser was assumed, and afterwards became insolvent, before notice of the assignment ; or, if the complainant, in becoming accommodation indorser for its benefit, relied on his indebtedness as indemnity and protection, not then having notice of the transfer of his note ; in either case, he might claim protection against his liability on the note. But neither of these is the case made by the pleadings and proof, and the bill must fail.—*Railroad Co. v. Rhodes*, 8 Ala. 226 ; *Andrews v. McCoy*, 8 Ala. 920 ; *Carroll v. Malone*, 28 Ala. 521 ; *Merrill v. Souther*, 6 Dana, 305.

BRICKELL, C. J.—It is very certain the demands now attempted to be set-off were not available in a court of law, because they were not subsisting at the commencement of the action. A demand, available as a set-off in a court of law, must be such as the defendant could, at the commencement of suit, have made the foundation of a separate, independent action against the plaintiff. A surety, therefore, paying the debt of the principal for which he was bound, after the commencement of suit against him on a debt due the principal,



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whatever may be the merits of his demand, has not a set-off available at law.—*Cox v. Cooper*, 3 Ala. 256; *Franklin v. McGuire*, 10 Ala. 557. Nor would the set-off have been available at law, if, at the time the action was commenced, it had been a subsisting demand. Sets-off have never been carried further than to put the assignee in the place of the payee or obligee, or of the party having the real, beneficial interest, though not expressly named as the payee or obligee. Unless there is an agreement, founded on a new consideration, made between the parties, a set-off by the maker of a promissory note, against an intermediate holder, has been uniformly disallowed.—*Stocking v. Toulmin*, 3 St. & Port. 35; *Kennedy v. Manship*, 1 Ala. 43; *Pitts v. Shortridge*, 7 Ala. 494; *Sykes v. Lewis*, 17 Ala. 261; *McKenzie v. Hunt*, 32 Ala. 494; *Bostick v. Scruggs*, 50 Ala. 10.

In the absence of all intervening equities, courts of equity put the same construction on statutes of set-off as do courts of law—they follow the law. The only intervening equity which can be supposed to withdraw the demands of appellant from the operation of the rule at law, is the insolvency of the Tallassee Manufacturing Company at the time of his indorsement of the bills of exchange for the accommodation of the company. Insolvency is recognized as a distinct equitable ground for the allowance of the set-off of demands which at law could not be made available.—*T. C. & D. R. Co. v. Rhodes*, 8 Ala. 206; *Donelson v. Posey*, 13 Ala. 752; *Wray v. Furniss*, 27 Ala. 471; *Carroll v. Malone*, 28 Ala. 521. But it is the insolvency of the original creditor against whom the set-off is preferred. No case in this court has, as yet, gone so far as to declare that the insolvency of an intermediate assignee, against whom a set-off is preferred, will justify the interference of a court of equity, and a departure from the fixed construction of the statute in courts of law.

Upon what principle can the court interfere, and vary the construction of the statute? While it is true that the assignee of a paper, not negotiable, takes it subject to all the equities to which it was subject in the hands of the assignor, this is here understood to mean the equities existing between the original parties, and not equities which may arise as to other parties in the course of the transfer of the paper. *Tison v. People's Saving & Loan Association*, 57 Ala. 323. It is these equities only the assignee risks; and if the risk of others were devolved upon him, as is said in *Blair v. Mathiott*, 46 Penn. St. 265, it would put an end to the transmission of such choses in action altogether, a thing which the law has no policy in discouraging.—*Downey v. Thoup*, 63 Penn. St. 322. If equity should intervene, and embarrass

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the assignee with the settlement of all matters which may be the proper subjects of sets-off as between the maker or obligor and intermediate assignees or holders, it would involve him in litigation, and, it may be, loss, because of dealings between parties of which the paper can give him no notice, nor information of any fact to put him on inquiry. The paper, of itself, furnishes the assignee evidence that the original transaction was between the maker and payee; and there is good reason for subjecting him to all the equities existing between them. The transfer, or assignment, is a transaction between the successive assignors and assignees, to which the maker is not a privy or a party, and cannot excite inquiry whether there have been any transactions between him and either or all of the assignors. It would be a departure from the general principle, that the assignee of a chose in action risks only the equities existing between the original parties, and not equities which may exist against an assignor, and would embarrass their transfer, diminishing their value, if, in a court of equity, there was a departure from the settled construction of the statutes of set-off, subjecting the assignee to loss, because they may have existed against any or all the assignors.

The appellee became the holder of the note on a valuable consideration, whether it was taken as a mere pledge for the payment of pre-existing debts, or upon a new consideration—the giving of further time for the payment of such debts—subject to no other equities than such as, before notice of the assignment, existed between the appellant and the original payees, not subject to such mere equities or rights as set-off, as may have arisen between the appellant and the Tallassee Manufacturing Company. If, before notice of the assignment, the appellant had paid the note to the company, or if, when the bills were indorsed, or at any time before notice of the assignment, there had been, upon a new consideration, an agreement between him and the company, that he should pay the bills in satisfaction of the note, it may be he would have an equity superior to that of the appellee. That is not the case now presented.

Affirmed.

STONE, J., not sitting.

## Marcum v. Burgess et al.

### *Action on Sheriff's Bond for Damages for Failing to Return Execution.*

1. *Sheriff; what damages recoverable against for failing to return execution, and how recovered.*—The failure of a sheriff to return an execution according to its mandate, is a breach of his official bond for which the plaintiff may, in a common law action, recover damages; but in the absence of averment and proof of actual injury, the damages are nominal, and the statutory damages of twenty per cent on the amount of the judgment are not recoverable in such an action, but only in a summary proceeding under the statute.

APPEAL from Etowah Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This action was brought by G. J. Marcum against Thomas J. Burgess, and the sureties on his official bond as sheriff of Etowah county. The complaint contained two counts, the first of which claimed five thousand dollars for the breach of the condition of a bond made by the defendants, payable to the State of Alabama with condition "that if the said Burgess shall faithfully perform all the duties that are, or may be by law, required of him as such sheriff, &c.," and plaintiff averred that the condition of the bond had been broken by said Burgess in this, "that he did not faithfully discharge the duties of sheriff during the time he continued to act as such; that one *alias* writ of *fiery facias* issued from the Circuit Court of Etowah county by the clerk of said court, on October 30th, 1879, in favor of G. J. Marcum against C. O. Hughes, as administratrix of the estate of Joseph Hughes, deceased, for the sum of \$334.77, besides costs of suit, which said writ of *fiery facias* was placed in the hands of said Burgess as such sheriff, October 30th, 1876, and which said *fiery facias* was issued on a judgment rendered March 31st, 1876, in said Circuit Court, for \$334.77, and which writ said Burgess failed to return three days before the Circuit Court to which the same was returnable, according to the mandate thereof, "wherefore, for the failure of said Burgess, sheriff as aforesaid, to return said writ of *fiery facias* according to law and the mandate thereof, the plaintiff claims twenty per cent. on the amount of said judgment, with the interest thereon." The second count was substantially the same, and averred a failure to return a *pluries fiery facias* issued on the same judgment. The defendants demurred to the complaint, because: "1. The plain-



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tiff seeks to recover in this action the summary statutory penalty of twenty per cent for failing to return the execution which was not recoverable in this action. 2. Plaintiff does not allege wherein, nor to what extent, he has been damaged. 3. The complaint and each count thereof is bad because it sets out by claiming five thousand dollars as damages, and ends by claiming the statutory penalty of twenty per cent. for failing to return the execution, and is therefore bad for duplicity." The court sustained the demurrer, the plaintiff declined to plead over, and judgment was thereupon rendered in favor of the defendants.

The rendition of this judgment is the error assigned.

W. B. MARTIN, for appellant. (No brief on file).

DENSON & DISQUE, for appellees.—A suit can not be maintained in the ordinary manner on a sheriff's bond to recover the statutory penalty for failure to return an execution. This penalty is given by the statute only, and the statute provides the remedy to enforce it. This excludes every other remedy. *Asken v. Myrick*, 54 Ala. 30; *Janney and Wife v. Buell*, 55 Ala. 408.

STONE, J.—The statutory damages of twenty per cent. on the judgment for not returning an execution according to the mandate thereof, can be recovered of a sheriff only in a summary proceeding under the statute.—Code of 1876, section 3357; *Governor v. Powell*, 10 Ala. 544. In a common law action on the bond for not returning such process, the statutory damages, as such, can not be recovered. The violation of duty by the sheriff, in not returning the execution, is a breach of the official bond, which entitles the plaintiff to recover; but in the absence of averment and proof of actual injury, there can be only nominal damages.—*Bagley v. Harris*, 9 Ala. 173; *Evans v. Governor*, 18 Ala. 659. The Circuit Court, however, erred in sustaining the demurrer to the complaint. It is sufficient for the recovery of nominal damages.

Reversed and remanded.

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## Lehman, Durr & Co. v. Bryan.

### *Homestead Exemption.*

1. *Conveyance of homestead, by husband to wife, not fraudulent.*—The conveyance by a husband to his wife of a homestead, even though voluntary, is not fraudulent.

2. *Abandonment of homestead; what constitutes.*—Temporary absence is not necessarily an abandonment. The *animus revertendi* of the owner is a material element in the determination of the question.

3. *Animus revertendi; how arrived at.*—The intention to return by circumstances and conditions attending the removal, including the declarations of the party accompanying the act.

4. *Declarations made after rights of creditors have intervened.*—Declarations made advantageous to the declarant after the rights of creditors have intervened, are entitled to but little, if any, weight.

5. *Animus revertendi; what constitutes.*—Where a husband left his home with his family, intending to return if his wife's health improved, held: The *animus revertendi* was not a present intention existing at the time of the removal, and the removal forfeits exemptions.

APPEAL from Henry Circuit Court.

Heard before Hon. H. D. CLAYTON.

It appears from the record, that on March 9th, 1876, Lehman, Durr & Co. recovered a judgment against Henry Wechsler, in the Circuit Court of Henry county, upon which execution was issued and a levy made by the sheriff upon a stock of goods owned by the defendant. This stock of goods was claimed by W. Kelly & Bro., and pending the settlement of their suit, another execution was issued in favor of Lehman, Durr & Co., and levied upon a house and lot, the former home of Henry Wechsler. The house was then occupied by J. C. Bryan. The sheriff sold the house and lot under the last execution, and Lehman, Durr & Co. became the purchasers. They thereupon sued Bryan in detinue, and Wechsler filed his claim of exemption. The other facts appear in the opinion.

WM. C. OATES, for appellant.

HENRY R. SHORTER, *contra*.

SOMERVILLE, J.—If the property sued for in this action was the *homestead* of Henry Wechsler at the date of the deed made by him to his wife, and as such exempted from liability to execution for debts, the conveyance of it, even

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though voluntary, would not be fraudulent as to creditors. Such property cannot be the subject of a fraudulent conveyance, for the reason that the rights of no creditor can be prejudiced by it.—*Fellows' Adm'r v. Lewis*, MSS.; Bump on Fraud. Con. p. 268; Thomp. on Homesteads, §§ 411-12.

The practical question presented for our decision is, do the facts stated show an *abandonment* of the homestead, and its consequent loss by forfeiture? Under the constitutional and statutory provisions in force at the time of the transaction, actual occupancy was necessary to support a claim of homestead exemption. Before the enactment of section 2843 of the Code of 1876, which provides that the temporary quitting or leasing of a homestead, for a period of not more than *twelve months* at any one time, shall be deemed an abandonment of it, and such lease or renting was held to operate as a forfeiture of the right of homestead.—*Koster v. McWilliams*, 41 Ala. 302.

Temporary absence, however, is not necessarily an abandonment. The *animus revertendi* of the owner is a material element in the determination of the question. This may be arrived at by circumstances and conditions attending the removal, including the declarations of the party accompanying the act, manifesting an intention of temporary or permanent absence, as the case may be. Declarations made advantageous to the declarant after the rights of creditors have intervened are entitled, however, to but little, if any weight. *Donley v. Ayres*, 23 Cal. 108; Thomp. Homesteads, § 270.

In the present instance, the premises claimed as a homestead were rented out before the existence of any statute permitting it. The owner removed, with his family, from the county, "intending to return *if his wife's health improved*, but never did return to, or occupy said house and lot." While the property continued to be so leased to a tenant, on August 15, 1877, Wechsler filed and recorded his exemption claim, and on the same day, made a voluntary conveyance of it to his wife, for the declared purpose of "securing a home to his wife and children, in case any accident should befall him." The purpose to return was on a contingency which might never happen. It was, therefore, an abandonment for the present, with the possibility of a future change in purpose. The *animus revertendi* was not a present intention existing at the time of the removal, but a mere possible, or at most probable, future purpose. Under the past decisions of this court, the homestead exemptions was forfeited, the facts constituting a clear case of abandonment.—*Stow v. Lillie*, 63 Ala. 257; *Boyle v. LeGrand & Co.* 59 Ala. 566; *McConaughy v. Baxter*, 55 Ala. 379; Code, § 2843.



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Independently of the above considerations, even though the conveyance in question were valid, it would be sustained only in a court of equity. There was no transfer of the legal title effected by the deed from Wechsler to his wife, such as would enable the defendant in ejectment to resist a recovery at law.—*McMillan v. Peacock*, 57 Ala. 127; *Gamble v. Gamble*, 11 Ala. 966; *Puryear v. Puryear*, 12 Ala. 13.

The conveyance was fraudulent and void as against the appellants who purchased at the execution sale.

The court below erred in the charge given at the instance of the defendants, and also in refusing to give the charge requested by the plaintiffs. The judgment is reversed, and the cause remanded.

## Goldsby et al. v. Goldsby.

### *Bill of Review.*

1. *Statement of title of plaintiff; sufficiency in.*—It is a principle of universal application in pleading founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the cause he is called upon to defend.

2. *Averments in a bill; completeness demanded.*—The averments of a bill in Chancery must be so complete that on demurrer or decree *pro confesso* the court can, without evidence, be able to perceive and affirm that complainant is entitled to the relief prayed.

3. *Averments in a bill of review; strictness demanded.*—There are stronger reasons for demanding strictness of averments in a bill of review, than for demanding it in an original bill; and relief cannot be granted upon vague and uncertain allegations.

4. *Statement of proceedings in original cause; detail necessary.*—It is necessary to state all of the proceedings in the original cause except the evidence on which the court found the facts on which it proceeded to render a decree.

5. *Chancellor's decree; presumption in favor of.*—In favor of the correct ruling of the Chancellor there will be indulged every reasonable presumption which the record does not affirmatively repel.

APPEAL from Dallas Chancery Court.

Heard before HON. CHARLES TURNER.

The facts are stated in the opinion.

BROOKS & ROY, for appellants.

STONE, J.—The bill in this case was filed to obtain a review and reversal of an alleged former decree of the same court, allotting dower to the appellee. Relief is prayed on

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the ground that there is error apparent in the former proceedings. In *McDougald v. Dougherty*, 39 Ala. 409, this court determined what parts of the record of the former suit should be presented and considered in a suit for review. We need not repeat what was there said.—See, also, *Brewer v. Bowman*, 20 Amer. Dec. 158, and note.

The bill in this case does not attempt to set out any of the proceedings in the former suit *in hæc verba*. It proceeds on the plan of setting forth the substance of the former pleading, facts and decree. There is nothing peculiar, or which calls for comment, in the averments concerning the original bill. It describes it as presenting the familiar case of marriage, seizin in fee of the husband during the coverture, that complainant, the widow, was entitled to dower therein, that said tract of land had been purchased and acquired by the defendants in said original bill, and that the husband of complainant had died. The averments of the bill of review, touching the amended bill filed in the original suit, necessary to be here presented, are as follows: "That the said Boykin Goldsby [husband] died without issue, and that thereupon the title to said tract of land . . . passed by way of executory devise under the provisions of the said will of Thornton B. Goldsby (senior), deceased, to the heirs at law of said Thornton B. Goldsby (senior), deceased." The bill of review then avers that the amended bill set forth who were the heirs at law, viz: the complainants in this suit. The bill of review then proceeds: "And such proceedings were had on said bill as amended, and supplemented, that" the said heirs were served with process; "and that afterwards, on, to-wit, the 10th day of October, 1874," another amendment was allowed, not necessary to be here noted. The averment concerning the decree in the original cause, is as follows: "That such proceedings were thereupon had in said cause upon said bill of complaint as amended, that the cause being at issue as to all the parties thereto, was submitted by the said complainant upon the said will of Thornton B. Goldsby (senior), deceased, and the other testimony, for final decree; and afterwards, on the 15th day of October, 1874, your Honor rendered a decree in said cause, and thereby ascertained and decreed that the said Sallie C. Goldsby, the complainant therein, was entitled to dower in said land." The bill then avers the allotment of dower, stating the particular lands allotted, and how allotted, and adds: "All of which will more fully and particularly, and at large appear, reference thereto being had, in and by the record and proceedings in said cause, still remaining of record in this court." We omitted to state at the proper place, that in the bill of re-

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view it is averred that the defendants to the original bill made the will of Thornton B. Goldsby (senior), deceased, an exhibit to their answer. The bill of review contains this further averment: "And your orators and oratrixes further show unto your Honor that, as appears on the face of the record and proceedings in said cause, the said Boykin Goldsby held said tract of land under and subject to the terms and provisions of the said will of his father, the said Thornton B. Goldsby (senior), deceased, and not otherwise, and under no other title or claim. And that by the terms and provisions of said will the estate of said Boykin Goldsby in said tract of land terminated upon his death without issue, and that said Boykin Goldsby died without issue; and that thereupon the title and the right to said tract of land, by the terms and provisions of said will, reverted and passed to, and vested in the heirs at law of the said Thornton B. Goldsby (senior), deceased, who are married and described in said bill of complaint as amended; and that the said Sallie C. Goldsby, the complainant therein, was not entitled to dower in said tract of land, nor in any part thereof." The bill then states the errors complained of in the usual form, with appropriate prayer for relief. The will of Thornton B. Goldsby (senior), deceased, is not made an exhibit to the bill of review, nor are its contents further shown than appears above. The foregoing is all the bill of review contains, material to the question we are considering.

There is appended to this record a certified transcript of the original suit, which this bill seeks to review. This transcript appears complete, except the single deposition put in evidence on that trial. Why this transcript is attached to this record, or sought to be made a part of it, we are not informed, further than that it was sent up in response to a *certiorari*. It is not made an exhibit to the present bill, in such form as that we can consider it a part of it.—Rules 17 and 66, Chancery Practice. Nor does the record of the former suit appear to have been consulted in the trial of this cause in the court below. We do not consider this attached transcript as any part of the record before us.

"It is a principle of universal application in pleading, founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness, to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the cause he is called upon to defend."—*Cockrell v. Gurley*, 26 Ala. 405. "Bills in chancery must set forth, not the evidence, but every material averment of fact necessary to plaintiff's right of recovery. So complete



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must be the averments of fact, that on demurrer, or decree *pro confesso*, the court can, without evidence, be able to perceive and affirm that complainant is entitled to the relief prayed. . . . The averments in the present bill, which, it is contended, take this case out of the operation of the general disability to contract under which married women labor, are but statements of legal conclusions, not averments of fact."—*McDonald v. Mobile Life Ins. Co.* 46 Ala. 468; *Duckworth v. Duckworth*, 35 Ala. 70. And we may add that in bills of review, stronger reasons apply why there should be strictness in the averment, than in most classes of suits. Such bill shows on its face that it seeks to have a review, or reconsideration of some question upon which the same court has once made a final ruling. The rule is, not to presume error, but to require that it be strictly shown. We presume everything in favor of the primary court's correct ruling, which the record does not disprove.—1 Brick. Dig. 781, sections 118 to 120. In *Caller v. Shields*, 2 Stew. & Por. 417—a case of bill of review, and well considered—this court said, that relief would not be granted on vague and uncertain allegations. This was but affirming that the error, to justify relief, must be apparent—must be made to appear. It is not enough to raise a doubt. The error must be clearly shown to authorize a bill of review, which, under our liberal system of appeals, can rarely become necessary.

Story, in his Eq. Pl. section 420, speaking of the frame of a bill of review, says: "In a bill of this nature, it is necessary to state the former bill and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it." Daniel, in his work on Ch. Pl. & Pr., marginal page 2064, gives the form of a bill of review. We omit the formal parts. He says, *insert the original bill—recite the substance of answer—insert the recital (of facts) and decree*. These directions come in parenthesis, after giving the formal parts of the bill. In 2 Barb. Ch. Pr. 561, is also a form given for such bill. Omitting the formal parts which he gives, he directs, parenthetically, *insert substance of original bill—set out prayer verbatim—insert substance of answer—set forth decree*. In *Turner v. Berry*, 3 Gilman, 541—a case of bill of review, the court said: "There is another fatal defect in this bill, and that is, that it does not recite or give the substance of the record of the former suit. . . . From the the very nature of the proceeding, it is manifestly necessary to state all of the proceedings in the original cause, except the evidence on which the court found the facts on which it proceeded to render a decree."

Applying these principles, we do not think the bill in the

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present case is sufficient. It fails to set out, in *hæc verba*, or in substance, the clause in Thornton B. Goldsby's will, under which it is alleged the Chancellor erred in decreeing dower to the appellee. True, it avers, first, that by the death without issue of Boykin Goldsby, her husband, the title of the land, out of which dower was carved, passed by executory devise, under the provisions of said will, to the heirs at law of said testator, T. B. Goldsby; and second, that the said Boykin Goldsby (husband of appellee), held said tract of land under and subject to the will of his father, the said T. B. Goldsby, and not otherwise, and under no other title or claim; that by the terms and provisions of said will the estate of said Boykin Goldsby terminated upon his death without issue, and thereupon, the title and right to said tract of land, by the terms and provisions of said will, reverted and passed to complainants, the heirs of said T. B. Goldsby, and said appellee was not entitled to dower therein. These averments are but statements of conclusions, not of fact; and, under the rules stated above, must be held insufficient. The will, or its substance, should have been brought before us as an averred fact; not as an asserted result from its uncommunicated terms. We must, from the face of the bill itself, be able to see clearly and confidently, that the court committed an error of law, within the remedial line the authorities mark out. All that is averred in this bill may be true, and we must presume it is; Boykin Goldsby's estate may have terminated outright, when he died without issue, and yet, by some other provision of Thornton B. Goldsby's will, his surviving widow may have been entitled to dower in the lands. In favor of the correct ruling of the Chancellor, we must indulge every reasonable presumption which the record does not affirmatively repel. *Hollingsworth v. McDonald*, 2 Har. & Johns. 230, was a case of bill of review, and tends to support these views.

Affirmed.

[Prince v. Prince.]

## Prince v. Prince.

*Bill in Equity to Cancel the Deed of a Married Woman to her Statutory Separate Estate, to compel the Conveyance to the Wife of Lands Bought with Money, a part of her Statutory Separate Estate, and to have an Account taken of Rents and Profits of the Lands while out of her Possession.*

1. *The statutory separate estate of wife, deed of trust to.*—The statutory separate estate of a wife is not subject to encumbrance to secure her husband's debt. When her estate is conveyed in trust for this purpose, neither the trustee or the beneficiary acquires any right cognizable in a court of law or equity.

2. *The same; absolute conveyance of.*—The true construction of the constitution and statutes prohibits and invalidates even a properly certified and absolute deed, when made to secure payment of the husband's debt.

3. *Same; limitations of prohibitory principle.*—The conveyance is binding where the wife takes an interest in lands for the payment of which a mortgage is given, and binding on the husband surviving his wife, and passes his life estate when the conveyance contains a warranty; and when the conveyance is made or contract entered into in the exercise of implied or express powers conferred by statute; and when the husband, having a legal title, and the wife a secret equity merely, a conveyance is made to a *bona fide* purchaser without notice.

4. *Same.*—All parties dealing with lands, the legal title to which is in the wife, are charged with a knowledge of their status and ownership.

5. *Compromise of claim.*—When a claim is absolutely and clearly unsustainable at law or equity, its compromise constitutes no sufficient legal consideration.

APPEAL from Chancery Court of Marengo.

Heard before Hon. CHARLES TURNER.

The original bill in this cause was filed July 3, 1875, by Arabella Prince, through her next friend, Oliver P. Boddie. The bill alleged that some of the land in question was in the possession of J. S. Ryall, and situated in Marengo county, and that said Ryall held under a conveyance made by A. C. Hargrove and H. C. Vaughn, said Hargrove and Vaughn being administrators of the estate of E. B. Vaughn. E. B. Vaughn was the beneficiary of a trust made to Oliver H. Prince by John H. Prince, the husband of Arabella C. Prince, complainant. This deed of trust conveyed lands, the statutory separate estate of complainant, that had come to her through devise by her father, John E. Boddie. The lands in question were conveyed by John H. Prince and Arabella C. Prince, his wife, to A. C. Hargrove and H. C. Vaughn, on a compromise of a claim they held as administrators of the estate of E. B. Vaughn against John H. Prince himself.



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The bill showed, further, that John H. Prince had used monies belonging to the statutory separate estate of his wife, the complainant, to purchase of Edwin A. Glover a tract of land containing one hundred and sixty acres, and took a deed from said Glover to himself.

The bill prayed, that John H. Prince should be compelled to convey these 160 acres to complainant, and that A. C. Hargrove and H. C. Vaughn be required to cancel the deed made to them by complainant and her husband; and that J. S. Ryall be decreed to surrender possession of the land bought by him of Hargrove and Vaughn, now claimed as the property of complainant, and a part of her statutory separate estate. The conveyance made by John H. Prince and his wife to A. C. Hargrove and H. C. Vaughn, contains the following clause: This indenture, made this the 18th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, between John H. Prince and Arabella C. Prince, the wife of said John H., parties of the first part, and H. C. Vaughn and A. C. Hargrove, as administrators of the estate of E. B. Vaughn, deceased, parties of the second part, witnesseth: "That whereas, the parties of the second part, in pursuance of an agreement in writing made and entered into by the parties to this indenture on the 13th day of January, 1869, to prevent litigation and to settle the matters in dispute between them growing out of a certain promissory note for ten thousand dollars, executed on the 2d day of March, 1860, and a deed in trust executed by the parties of the first part on 21st day of April, 1860, conveying to O. H. Prince, trustee, eight hundred and fifty-two acres of land, more or less, situated in the county of Marengo, and State of Alabama, to secure the payment of said promissory note; which note and deed were both held by said parties of the second part, as administrators, &c., as aforesaid, have made application to the Probate Court of Tuscaloosa county for an order authorizing them to compromise with the parties of the first part; and, whereas, said court did, on the 15th of January, 1869, grant an order authorizing said compromise; and whereas, said parties of the second part have given up said promissory notes and cancelled said deed in trust in pursuance of said agreement; and whereas, the party of the second part have at, and before, the sealing and delivery of these presents, paid to the said parties of the first part, the sum of twenty-five dollars, lawful money of the United States, the receipt of which the parties of the first part do hereby acknowledge; now, therefore, in consideration of the premises, the parties of the first part have granted, bargained, sold and conveyed, etc." This deed was to 532 acres of land.

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One hundred and sixty acres of the land conveyed was the land bought of Edwin A. Glover by John H. Prince, with a note belonging to the statutory separate estate of his wife, the complainant, but the deed to which was made to him alone.

The written agreement that was made the basis of the deed contained the following clause : "Whereas, the parties of the first part have taken legal steps to have said land sold in pursuance of said deed of trust; and whereas, there are some doubts as to the validity of said conveyance; and whereas, protracted litigation is threatened; now, therefore, to prevent litigation, and to settle the matters in dispute, the parties aforesaid do covenant and agree as follows," etc. This conveyance was made, and the administrators sold the land, thus conveyed, to J. S. Ryall, one of the parties to the bill, and gave him title.

On final hearing the Chancellor dismissed the bill, and the complainant took an appeal.

EUGENE McCAA, for appellant.

G. G. LYON & B. B. LEWIS, for appellees.

SOMERVILLE, J.—The deed of trust, executed by the complainant and her husband, on the 21st of April, 1860, to O. H. Prince, as trustee, was, under the repeated decisions of this court, void and of no legal validity, as against the wife. The debt secured was that of the husband, and the property conveyed was the statutory separate estate of the wife. Her property was not legally subject to be thus encumbered, and neither Prince, the trustee, nor E. B. Vaughn, the beneficiary, acquired any rights under it, cognizable in either a court of law or of equity—*Bibb v. Pope*, 43 Ala. 190; *Denechaud v. Berry*, 48 Ala. 591; *Thomas & Co. v. Rembert's Adm'r*, 53 Ala. 561.

The provisions of the constitution and statutes, creating this character of estate, have been construed to prohibit its conveyance, where it is done in payment or satisfaction of the husband's debt, even by *absolute deed*; and although the deed is executed jointly by husband and wife, and is properly attested, or acknowledged before an officer, as required in such cases by the statute.—*Weil & Bro. v. Pope et al.*, 53 Ala. 585.

There are, however, some just limitations upon this prohibitory principle. Where the debt secured by mortgage is given for the purchase-money of lands conveyed to the wife, the conveyance is binding.—*Strong and Wife v. Waddell*, 56

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Ala. 471. Or where there are covenants of warranty in such conveyance, though void against the wife, they are so far valid against the husband as to pass his life estate in his wife's lands, in the event of his surviving her.—*Chapman et al. v. Abrahams*, 61 Ala. 108. Or where a conveyance is made, or contract entered into, in the exercise of some express power conferred on the wife by statute, or in the exercise of an implied power necessary and proper in carrying out such express power.—*Beeton v. Lellick*, 48 Ala. 226. Or where the legal title of the wife's property is in the husband's name, with a mere secret equity in the wife, a *bona fide* purchaser for value, without notice of such equity, may obtain a good title.—*Holly v. Flournoy*, 54 Ala. 99.

In this case, the title of all the lands in controversy was originally in the complainant, Mrs. Prince, except the tract of 160 acres purchased from Glover by her husband, John H. Prince, October 23, 1849. The deed to the latter was made directly to him, without words of recital or conveyance, sufficient to put one on inquiry as to the interest claimed by the wife.

It is not argued that E. B. Vaughan, the beneficiary of the deed of trust made to O. H. Prince, is a *bona fide* purchaser for value, in as much as his claim, secured by this conveyance, was a pre-existent debt, and not one created on a contemporaneous consideration.—*Alexander v. Caldwell*, 55 Ala. 517.

Nor could this defense be set up by the appellee Ryall, unless his vendors, the administrators of E. B. Vaughn, could successfully do so. He was a purchaser at a judicial sale made under order of the Probate Court, and the doctrine of *caveat emptor* applied to him.—*Fore, Adm'r, v. McKenzie*, 58 Ala. 115.

These considerations authorize a distinction to be made between these lands. So far as concerns that portion of them which complainant acquired by devise from her father, John E. Boddie, there is little difficulty in reaching a proper conclusion. The legal title of these lands was in her. All the parties dealing with them, as mortgagees or vendees, are presumed to be advised, and are charged with a knowledge of their *status* and ownership. As asserted by Lord Mansfield, in *Keech v. Hall*, Doug. 22: "Whoever wants to be secure when he takes a lease, (makes a *purchase*), should inquire after and examine the title deeds." The mortgage of these lands was a nullity, and the attempted conveyance of them by deed passed no title to the administrators of E. B. Vaughn.



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The 160 acre tract purchased from Glover stands on a different basis. The title of this was in John H. Prince, and not in his wife. The administrators of Vaughn had no knowledge or information of Mrs. Prince's latent equity. They knew no facts which could possibly awaken their inquiry. In purchasing it, they parted with value, in giving up and cancelling the \$10,000 note due by John H. Prince and his sureties to their intestate, to say nothing of the nominal consideration of the twenty-five dollars paid at the time to complainant.

The Chancellor correctly found that the vendees of this tract were *bona fide* purchasers for value without notice of the defect in title. They must, therefore, be protected as such.

It has been insisted with earnestness, in this case, that this was a compromise of a doubtful claim between complainant and the administrators of Vaughn, and on this account the deed ought to be sustained in its entire integrity. We do not think this view of the case assists the matter. It is very true, that the law greatly favors the compromise of doubtful rights or demands, and such a compromise, when made *bona fide*, is a sufficient legal consideration for a contract or promise, even though it subsequently appears that the demand or claim was unfounded. And such is the case, whether a suit is pending or not.—*Allen and Wife v. Prater*, 30 Ala. 458; *Wyatt v. Evins*, 52 Ala. 285; *Sims v. Lee*, MSS. Dec. T. 1880.

But, when a claim is absolutely and clearly unsustainable, at law or equity, its compromise constitutes no sufficient legal consideration.—1 Addison on Contr. § 14, note 1; *Savings Bank v. Concord*, 15 N. H. 119. It is said that, at the time this compromise was effected, this court had not announced its conclusion holding such mortgages to be void, and that it presented a grave matter of doubt among members of the legal profession. The *facts*, however, were undisputed, and the only doubt was as to the *law*. The statutes on this subject were then as fully promulgated as now. Every one was required to know their proper construction, and neither ignorance nor doubt was any excuse.—*Ignorantia facti excusat; ignorantia juris non excusat*.—Pel. Leg. Max. p. 100.

In the case of *Sims v. Lee* (MSS. Dec. T. 1880), a compromise was sustained, involving a tract of land in which the wife claimed an equity, based on the alleged conversion of a portion of her statutory separate estate by the husband, the title having been taken in his name. The *fact* of such conversion, or investment, was there controverted. The com-

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promise was based on doubts entertained of a *fact*, not of the *law*, nor was it a mixed doubt of fact and law.

The decree of the Chancellor, dismissing complainant's bill is reversed, and the case is remanded for further proceedings in accordance with this opinion.

## Scarborough v. Malone et als.

### *Action on Official Bond of Sheriff.*

1. *Attachment lien ; replevy.*—Replevy of property attached, does not destroy or impair the lien created by the attachment.

2. *Same ; levy of second attachment ; when wrongful.*—The subsequent levy of a second attachment, not in subordination to the lien of the first attachment, is wrongful, and it is wrongful for the sheriff to deliver the property to the plaintiffs in the second attachment.

3. *Levy of second attachment ; delivery of property to plaintiffs in ; sureties on replevin bond, when discharged.*—The levy of a second attachment, and the delivery of the property to the plaintiffs in the second attachment, discharges the sureties on the replevin bond in the former attachment from all liability. (*Cordunian v. Malone*, 63 Ala. cited and approved.)

4. *Attachment ; liability of sheriff for non-feasance or misfeasance.*—A sheriff is liable for misfeasance or nonfeasance in the exercise of the powers conferred on him by law. And, where a sheriff seized property under a junior attachment, taking it from the possession of the sureties on the replevin bond in the first attachment, and thereby discharging them from their liability on such bond. *Held*, It was the duty of the sheriff to keep the property safe, so that it would be forthcoming to answer the first levy which was the prior lien. *Held further*, That the neglect of such duty was nonfeasance ; and the delivery of such property to the plaintiffs in the second attachment suit, whereby they were enabled to exercise ownership over it, so that it could not be reached and subjected to the prior lien, was misfeasance, rendering the sheriff liable to the plaintiffs in the first attachment for all the damages they sustained.

5. *Sheriff ; notice to, of levy by his predecessor, necessary to fix his liability.* Where a prior levy is made, not by a sheriff but by his predecessor in office, notice to him of such levy is necessary to fix his liability.

6. *Same ; notice to deputy, when equivalent to notice to sheriff.*—Notice to a deputy, appointed by a sheriff, and authorized to make a levy of an attachment, at the time he makes such levy and takes possession of the property, of the existence of a former lien, is notice to the sheriff.

7. *Attachment lien ; ownership of property.*—The ownership of chattels is not divested by the levy of an attachment. The levy creates an inchoate lien, dependent on the judgment. If the judgment is obtained, the lien relates back to the levy, and is superior to all subsequent liens, alienations, or transfers.

8. *Charge of court, when no conflict in the evidence.*—Where the evidence is without conflict, it is the duty of the court to refer its credibility to the jury, and, on request, to charge directly on the effect of such evidence.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

Appellees, George T. Malone and C. J. Knox, as surviving partners of the firm of Knox, Malone & Knox, brought this

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action against appellant in August, 1850, for five hundred dollars, with interest from the 1st of November, 1876, for damages for the breach of appellant's bond as sheriff of Pike county. The sureties on this bond were not joined as parties defendant. The breach alleged is that appellant, while in the discharge of his duty as sheriff aforesaid, levied an attachment in favor of Coleman & Wiley, against D. D. Barr and J. W. Barr, upon four bales of cotton; that before the time this levy was made the same property had been levied upon by one Segars, the predecessor of appellant in the office of sheriff, under an attachment for rent in favor of appellees as surviving partners aforesaid. That at the time appellant made said levy he knew of the prior levy by his predecessor in office, and that after appellant had made said levy and obtained possession of the cotton aforesaid, he permitted the same to be taken by Coleman & Wiley, who sent the cotton out of the State, and that the attachment suit of appellees resulted in a judgment against said Barr, and which was wholly unsatisfied. The complaint further alleges that the attachment suit of Coleman & Wiley had been dismissed by the plaintiffs therein.

All of the material facts alleged in the complaint were substantiated by the evidence. It was shown that the cotton levied on under the attachment issued in behalf of appellees had been levied upon said cotton, and that the same had been replevied by Barr, who, by agreement, had left it in the possession of one Cordaman, one of the sureties on the replevin bond, to be held by him to await the result of the first attachment suit; that the deputy of appellant, one Golson, came to said Cordaman and demanded said cotton; that when such demand was made said deputy was informed that said cotton had been levied on at the suit of appellees, had been replevied, and was held by said Cordaman as surety on the replevin bond. It was further shown that said deputy took said cotton and carried it to Troy, where said Coleman & Wiley did business, and deposited in a warehouse there; that Coleman & Wiley obtained the receipts of said cotton and delivered them to the warehousemen, and at their direction the cotton was shipped out of the State, Coleman & Wiley indemnifying warehousemen therefor. This was substantially all the evidence. The defendant objected to the evidence of notice to the deputy sheriff of the levy of the first attachment, but the court overruled the objection. Upon this evidence the court, at the request of the plaintiff, charged the jury that if they believed the evidence, they must find for the plaintiff.



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The giving of this charge, and the admission of the testimony objected to, are here assigned as error.

M. N. CARLISLE, for appellants.

W. H. PARKS, and JNO. D. GARDNER, for appellees.

BRICKELL, C. J.—In *Cordaman v. Malone*, 63 Ala. 556, we held the levy of the attachment of Knox and Malone, created a prior lien on the cotton, to recover the value of which is the object of the present action; that the replevy of the cotton did not destroy or impair the lien; that the subsequent levy of a second attachment, not in subordination to the lien of the first was wrongful; that it was wrongful in the sheriff to deliver the cotton to the plaintiffs in the second attachment; and that the second levy and delivery of the cotton to the plaintiffs in that attachment, discharged the sureties in the replevin bond from all liability.

A sheriff is liable for nonfeasance, or misfeasance, in the exercise of the powers entrusted to him by law, or in the discharge of the official duties imposed by law. Having seized the cotton under the junior attachment, taking it from the possession of the sureties in the replevin bond, thereby discharging them from liability, it was the duty of the appellant to keep it safely, so that it would be forthcoming to answer the first levy which was the prior lien. The neglect of this duty was nonfeasance, and the delivery of the cotton to the plaintiffs in the second attachment, whereby they were enabled to exercise ownership over it, sending it without the State, so that it could not be reached and subjected to the prior lien, was misfeasance rendering him liable to the plaintiffs in the first attachment for all the damage they sustained. *Griffin v. Isbell*, 17 Ala. 184.

The prior levy not having been made by appellant, but by his predecessor in office, notice to him of the levy, and that the cotton was in fact then in the custody of the law, subject to the lien of the first attachment, was necessary to fix his liability. Notice to the deputy he had appointed and authorized to make the levy, at the time he made the levy, and took possession of the cotton, was notice to the appellant, whether the deputy, as he was in duty bound, communicated it to him or not. It is a necessary and elementary principle, that notice to an agent acting in the line of his authority, while transacting the business of the principal, is notice to the principal. Whoever employs, and authorizes another to act for him, is subjected to all the consequences which would attach, if in person he had transacted the business the agent trans-

[Waugh v. Montgomery.]

acts.—Wharton on Agency, § 177. The evidence of Wood, and of Nall, that they informed the deputy of the levy of the first attachment, and that it was in the possession and care of Cordaman, one of the sureties in the replevin bond, was proper and admissible, and the court below would have erred if the objection made to it had been sustained.

The ownership of chattels is not divested by the levy of an attachment. The levy, however, creates an inchoate lien dependent upon the judgment. If judgment is obtained, the lien relates back to the levy, overriding and superior to all subsequent liens and all alienations, or transfers, the owner may make. No instructions Barr may have given either the warehouseman, with whom the cotton was deposited, or the appellant, as to turning over the cotton to Coleman & Wiley, or making any other disposition of it, could relieve the appellant from the duty of holding and keeping it subject to the lien created by the levy of the first attachment. Barr's ownership, his power of the disposition of the cotton, was subject and subordinate to that lien, and it was a wrong in whoever had notice of it, to yield obedience to his instructions, if the effect was to impair it. There was no error, consequently, in excluding the evidence offered by the appellant.

The evidence was without conflict; the charge of the court refers its credibility to the jury, and if believed, it was clearly sufficient to support the action. In such case, it is the duty of the court, on request, to charge directly on the effect of the evidence.

We find no error in the record, and the judgment is affirmed.

## Waugh v. Montgomery.

### *Homestead Exemption, and Redemption of Land held under a Mortgage.*

1. *Homestead exemption; facts in bar of right to.*—A man who has not occupied premises, and who fails to interpose his claim to have them exempt until after the sheriff has sold, is not allowed the benefit of the exemption statutes.

2. *Mortgage credits.*—The purchaser of a mortgage debt who receives along with the mortgage a portion of the property mortgaged, must apply the property thus acquired to the satisfaction of the mortgage debt; and proof failing, the presumption is that the property thus transferred cancels the debt.

APPEAL from Dallas Chancery Court.  
Heard before Hon. CHARLES TURNER.

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In December, 1874, the appellee in this cause obtained a judgment in an attachment suit brought in the Circuit Court of Dallas county against the appellant, L. H. Montgomery. The judgment condemned the interest of Waugh in the land, the subject of this suit in Chancery. On the 15th day of March, 1875, the sheriff sold the lands and L. H. Montgomery became the purchaser. On 11th January, 1873, Mathew R. Waugh and his wife, E. A. Waugh, executed a mortgage upon this same tract of land to W. H. Couch, to secure payment for money and supplies advanced by Couch. This mortgage conveyed all the crop of cotton and corn to be grown in 1873, on the plantation of said Waugh, and also eight mules and all of the lands upon which the attachment was levied. On 22d January, 1875, Couch transferred the mortgage to Philo G. Cocks, a resident of the State of Mississippi, Waugh himself in the meantime having removed from Alabama to Mississippi. Waugh's purpose, as shown by the testimony, in going to Mississippi, was to make a crop and then return to Alabama. He had taken a lot of mules and horses with him to Mississippi. These mules and horses were of those mortgaged to Couch. They were surrendered to Couch, and when Couch transferred the mortgage to Cocks, these mules and horses were transferred also, as being a part of the property securing the mortgage.

The appellee filed his bill praying that he might be allowed to redeem the land, and to compel Cocks to account for the rents and profits during the time the land was held by him.

The appellant alleged, by cross-bill, that his removal to Mississippi was for the purpose of making a crop only, and that the removal was not with the intention of changing his residence, and that in consequence the attachment proceedings which were made the basis of Montgomery's judgment, was illegal.

The Chancellor directed the register to charge Cocks with the value of the mules and of the rent in favor of the appellee.

FELLOWS & JOHNS, for appellee.

REID and MAY, for appellant. (No brief came into the reporter's hands.)

STONE, J.—There are two conclusive reasons, not to notice any others, why Mr. Waugh's claim of homestead exemption can not be allowed. First, it is neither averred nor proved that he occupied the premises, which he claims as exempt. On the contrary, it is shown that neither he nor his



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family has occupied them since 1873. Second, the claim was not interposed, until after the sale by the sheriff, at which Mr. Montgomery became the purchaser.—*Martin v. Lile*, 63 Ala. 406; *McConaughy v. Baxter*, 55 Ala. 379; *Preiss v. Campbell*, 60 Ala. 635. This disposes adversely of all claim asserted by Waugh.

If Mr. Cocks has any claim under the mortgage transferred to him by Couch, he has been very remiss in asserting it. The mortgage secured only one thousand dollars. If the advances Couch made exceeded that sum, the mortgage did not secure the excess. Of this one thousand dollars, Cocks paid six hundred, and had turned over to him six or eight mules and horses, covered by the mortgage, which was afterwards assigned to him. *Prima facie* he was liable for the value of this stock so turned over, or rather, it was a payment to him, *pro tanto*, of the claim he asserts under the mortgage. If this is susceptible of explanation, Cocks and Waugh could have explained it. Neither of them was examined as a witness, either in chief, or on the accounting before the register. The Chancellor did not err in decreeing that the value of the mules and horses should be a credit on the mortgage debt, because, first, Couch took possession of them under the mortgage; and when Cocks paid the six hundred dollars, they were handed over on his order. In taking the account, neither Waugh nor Cocks offered any proof; and there were no exceptions filed to the report of the register. In these conditions, we think the Chancellor was right in presuming that Cocks had no rightful or valid claim, to be enforced against the land.

The decree of the Chancellor is affirmed.

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### *Action on a Promissory Note.*

1. *Testimony of husband and wife, for or against each other.*—Husband and wife are competent witnesses for or against each other, when not required to disclose confidential communications.

2. *Proper action, when goods or choses in action are, by a wrong-doer, subsequent to his tort, converted into money.*—When goods or choses in action are converted by a wrong-doer into money, subsequent to the tort, giving the cause of action, the owner may waive the tort and recover in assumpsit the money received.

3. *Same; when not converted into money.*—Trovee lies to compel a delivery of a note improperly obtained, if on demand delivery is refused; but in this

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case, not having used the note as money, having converted it simply, there is no ground on which the law can raise a promise to pay money for the conversion.

**APPEAL from Selma City Court.**

Heard before Hon. JONATHAN HARALSON.

Miller, the appellant in this cause, was the administrator of the estate of Elizabeth H. Mitchell. On the first day of August, 1858, Elizabeth Mitchell loaned to defendant, King, one thousand dollars in currency of par value, with gold in return, for which loan the defendant made the plaintiff a promissory note for the sum of eleven hundred and thirteen 33-100 dollars, payable on the first day of January, 1860. The testimony was conflicting as to whether the defendant renewed the note on January 1, 1860. The defendant stated that mention was made of a renewal, but that no renewal was ever made. The defendant introduced testimony tending to show that, in the spring of 1863, he gave his wife five hundred (\$500) dollars in Confederate treasury notes, to be paid to the plaintiff, Elizabeth Mitchell. The receipt for this payment, signed by Elizabeth Mitchell, had been lost, and defendant offered to prove the payment by his wife, and the court allowed her to testify to the fact. The testimony of the defendant tended to show that the remainder due on his note was paid by him to an authorized agent of plaintiff in Confederate States bonds, and that this was done with the consent and approval of the plaintiff. The note was thereupon taken up and destroyed by defendant. The testimony of plaintiff tended to show that her consent was never given to the payment of the note in the manner the defendant paid it; that she refused always to accept Confederate States bonds in discharge of the debt, and that she had never made a subsequent ratification of her agent's act in surrendering defendant's note for cancellation or destruction.

LAPSLEY & NELSON, for appellant, with whom was THOS. H. WATTS, SR.

PETTUS, DAWSON & TILLMAN, and BROOKS & ROY, for appellee.

BRICKELL, C. J.—1. The statute removing interest as disqualifying a witness, on abolishing incompetency because of the relation of parties to suits, very soon after its enactment, was construed as rendering husband and wife competent witnesses for or against each other, when they were not required to disclose confidential communications.—*Robinson v. Robinson*, 44 Ala. 234; *Lang v. Walters*, 47 Ala. 625; *Rowland v. Plummer*, 50 Ala. 193; *Sumner v. Cooke*, 51 Ala. 521;

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*Chapman v. Holding*, 60 Ala. 533. Subsequent to the larger number of these decisions, the statutes were revised, and there was no alteration or change made in the statute referred to; and of consequence, it must be taken that it was re-enacted with a knowledge of the repeated construction it had received, from which we cannot now depart.

2. When goods, or choses in action, are by a wrong-doer converted into money, the owner may waive the tort, and recover the money received.—1 Brick. Dig. 150, §§ 227–29. The rule applies, however, only when subsequent to the tort, which, of itself, gave a cause of action, there has been the reception by the wrong-doer of money, or that which he received as the equivalent of money, for the property of the plaintiff. If the appellee improperly obtained possession of his note from Mrs. Mitchell, trover for its conversion could have been supported against him, if on demand he had refused to deliver it. And if he had subsequently used it as money in any transaction, the conversion could have been waived, and assumpsit for the money, the amount for which he had used it, could have been supported. But, not having used it as money—simply having converted it, there is no ground on which the loan can raise a promise to pay money for its conversion.

Affirmed.

## Holmes v. Richards.

### *Bill in Equity to enforce Vendor's Lien on Land.*

1. *Vendor's lien; when purchaser cannot resist, on account of defect in title.* A purchaser of land under an executory contract, having expressly stipulated for a postponement of payment of the purchase-money until the termination of a pending suit involving his vendor's title, and for a rescission of the contract "if said litigation terminate unfavorably to the interest of R." (vendor), "so that he cannot make good and valid titles to said lot;" and having received possession under the contract, and still retaining it,—cannot resist a bill to enforce payment of the purchase-money, on account of the defect in the vendor's title, or his inability to comply with the terms of the contract, when it appears that the suit was decided in favor of his vendor, on the ground that the adverse party, having been adjudicated a bankrupt, could not assert any right under the contract alleged by him, and the assignee in bankruptcy has become barred by the lapse of time.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 8th May, 1878, by Evan G. Richards, against John A. Holmes and J. J. Mc-Lemore and wife; and sought to enforce a vendor's lien for



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the unpaid purchase-money of a house and lot in the town of La Fayette in said county, or a one-third interest therein, sold by said Richards to said Holmes by a contract made and entered into between them on the 8th December, 1873. By the terms of the contract of sale, Holmes paid \$20 in cash, and executed his promissory note for \$260, payable to said Richards on the 1st December, 1874; and Richards executed and delivered to Holmes his bond for title, in the usual form, conditioned to make, or cause to be made, "to said Holmes, his heirs or assigns, good and valid titles to said third interest in said lot, on the full payment of said note. At the same time, and as a part of the same contract, the parties both signed another writing, which recited the execution of the note and bond for title, and contained the following additional stipulations: "And whereas said one-third interest of said lot is now in litigation between said Richards and Benjamin F. Rea, now it is agreed, as a part of the consideration of said sale and purchase, that if said litigation should not be settled or determinated before the first day of December, 1874, that the payment of said note of \$260 is to be postponed until said litigation about said lot is settled or determined; but said note is to draw interest from maturity, till paid. Bt it is further agreed, that if said litigation terminate unfavorably to the interest of said Richards, so that he cannot be able to make good and valid titles to said one-third interest in said lot; then, and in that case, said contract of sale and purchase is to be void; said Richards paying back to said Holmes the said twenty dollars, without interest, and delivering up said note; and said Holmes delivering up the possession of said one-third interest, free of rent for the time occupied. Signed in duplicate," &c. McLemore and wife were joined as defendants, on an allegation that Holmes had sold and conveyed the lot to them, and that they were in possession when the bill was filed.

In the Chancery suit of Rea against Richards, mentioned in the writing above set out, the bill was filed by Rea on the 7th June, 1873, and sought to enforce the specific performance of a contract, by which, as alleged, said E. G. Richards sold to Rea, as trustee for his wife, an undivided one-third interest in said house and lot, and, the purchase-money having been paid in full, to compel the execution of a conveyance.

On final hearing, on pleadings and proof, on that case, in March, 1874, the Chancellor dismissed the bill, on the ground that, as stated in his decree, "that equity does not require a specific performance of the contract, as the proof shows it to be;" and his decree was affirmed by this court on appeal, during its December term, 1876, on the ground that the right

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to enforce the alleged contract, if any was shown, had passed to the assignee in bankruptcy of said Rea, who had been adjudicated a bankrupt before the filing of his bill.—See the report of the case in 56 Ala. 396. The bill in this case alleged that, after the termination of that litigation by the decision of the Supreme Court, the complainant tendered a deed, with full covenants of warranty, to the defendant Holmes, and demanded payment of his note for the purchase-money; and that said defendant refused to pay the note, and continued in the possession of the house and lot until he sold and conveyed to McLemore and wife. There was no dispute as to the terms of the contract between the parties, as shown by the writings executed by and between them; but Holmes, in his answer, insisted that the decision of the chancery suit in favor of Richards did not give him a good title to the house and lot, such as the contract between the parties contemplated, but only determined that, if Rea ever had any cause of action, it had passed to his assignee in bankruptcy, who was not a party to that suit; that Richards in fact had no valid title to the interest in the house and lot which he contracted to sell and convey, and that said interest really belonged to a railroad company, of which Richards was president and attorney. The facts shown by the record, in reference to these matters, are not material as the case is here presented. Holmes incorporated in his answer a demurrer to the bill for want of equity, and prayed that answer might be taken as a cross-bill, asking a rescission of the contract between him and Richards, a cancellation of the note, &c.

The Chancellor overruled the demurrer to the bill, and on final hearing on pleadings and proof, dismissed the cross-bill, and rendered a decree for the complainant; and his decree is now assigned as error.

DOWDELL & HOLMES, for appellant.

E. G. RICHARDS, *pro se, contra*.

BRICKELL, C. J.—The agreement between Richards and Holmes stipulated and appointed the contingency, on the happening of which the contract of sale was to be rescinded, and the parties placed *in statu quo*. That contingency has not occurred, and it is now legally impossible that it can ever occur. If there was a valid executory agreement of sale made by Richards with Rea, by the terms of which Rea acquired an equitable title to Richard's estate in the premises, on Rea's bankruptcy, all right to enforce the agreement vested in his assignee. The right of enforcing it the assignee has long since lost by the lapse of time. The suit instituted by

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Rea, referred to in the agreement, was determined adversely to him; and the agreement with him is not now an incumbrance or cloud on Richard's title. It was only in reference to that suit, and its termination adversely to Richards, supporting the equity claimed by Rea, that Holmes stipulated to be relieved, or Richards consented to relieve him from liability to pay the purchase-money. That event not having happened, there is no equity in his claim to a rescission of the contract of purchase.

Taking the case in all its aspects, it is the one of not infrequent occurrence, a vendee in possession, enjoying all the benefits of the contract of purchase, and yet seeking to escape its obligations, by disputing the title of his vendor. There was no fraud practiced on the vendee. He was fully informed of the nature and character of the vendor's title. It was that title, when the particular incumbrance, or cloud, to which the agreement refers, was removed, he contracted to purchase, and was satisfied to acquire. Against that incumbrance or cloud, and against all loss by reason of it, he carefully guarded himself, by stipulating for delay in the payment of the purchase-money, until it was removed, and, if it was not removed, by stipulating for a rescission of the contract. The cloud or incumbrance no longer exists; it can never involve him in loss, unless he passively submits to, or connives in its assertion. The contract into which he has entered, good faith and equity require him now to pay the purchase-money.

Affirmed

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### *Bill in Equity to Enjoin the Erection of a Dam.*

1. *Nuisances; equity has jurisdiction to restrain.*—The jurisdiction of courts of equity to restrain the commission or continuance of nuisances, public or private, is well settled, and has been frequently recognized in this court; it is founded on the ability of the court to afford more complete relief than courts of law can grant.

2. *Same; when trial of action or issue at law necessary before equity will enjoin.* If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial at law; and will, according to the circumstances, direct an issue, or allow an action at law, and even expedite the proceedings, if necessary, continuing the injunction in the meantime. But, when the thing sought to be restrained is not necessarily obnoxious, but only may prove so according to circumstances, then the court will refuse to interfere until the matter has been tried at law—generally by an action, but sometimes, where an action could not be properly framed, on an issue out of chancery.



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3. *Same; evidence required before equity will declare thing to be without trial of issue.*—Unless the evidence is full, clear, and convincing, the court will not take upon itself to decide, without an issue at law, that a nuisance in fact exists, or that a thing which may or may not become a nuisance will so operate.

4. *Mill-dams; when erection of restrained without action at law.*—A nuisance which operates to destroy health, or to seriously diminish the comfortable enjoyment of a dwelling-house, is productive of irreparable mischief, for which no adequate remedy at law can be given; and the erection of dams, or other obstructions, which materially affect the natural flow of a running stream, and injure the health of persons living in the neighborhood, has been restrained by injunction, without waiting the result of an action, or the trial of an issue at law.

5. *Same; statutory policy as to erection of, followed in courts of equity.*—From a very early period in the history of this State, down to the present time, the erection of mill-dams, or other similar obstructions of a running stream, have been controlled by statutory provisions, which indicate a settled policy to subordinate the right of the proprietor to build such structures to the preservation of the health of the neighborhood; and in the class of cases to which these statutory provisions relate, the jurisdiction of courts of equity should be exercised in furtherance of this policy.

6. *Same; parties to bill to enjoin erection of.*—Where the legal title to lands which have been sold to one who intends erecting a mill and dam upon them remains in the vendor, he having an immediate right of entry thereon, and having made an executory contract of sale of them with full knowledge of the purposes to which the vendee intends to devote them, the vendor is, in such case, a proper, if not a necessary party, to a bill of injunction to restrain the erection of the dam.

APPEAL from the Chancery Court of Pike.

Heard before Hon. H. AUSTILL.

The opinion sufficiently states the facts.

JOHN D. GARDNER, for appellant.—The complainant had a right to maintain a bill in equity for an injunction.—See Wood's Law of Nuisances, page 835, § 783, page 711, § 698, note 2, citing *Mills v. Hall*, 9 Wend. (N. Y.) 315, and page 812, § 769, citing in note 1 the case of the *Fishmongers' Co. v. The East India Co.* 1 Dick. 163. "Where the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interfere by injunction."—Lord Eldon, in *Attorney-General v. Nichol*, 16 Ves. 342–3, and in *Crowder v. Trickler*, 19 Ves. 617. The jurisdiction of courts of equity to interpose by injunction, is well established by the Supreme Court of Alabama.—*St. James' Church v. Arrington*, 36 Ala. 546, and the authorities therein cited; *Rosser v. Randolph*, 7 Por. 238. Respondents should not be allowed to do by themselves what they would not be allowed to do if they sought the aid of the statute; that is, "if the aggregate healthfulness of the neighborhood would *probably* be put in peril, or if the inhabitants of the neighborhood, considered as a unit, would *probably* be rendered *less* healthy by the erection of the proposed dam, the order should not be granted."—*Hollis v. Charman*, in manuscript. The failure of respondent, McQuaggs, to proceed under the statute, conduces strongly to show

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that the undertaking would fall within the inhibition of the statute, and that, at least, in the estimation of the people of the vicinage, "the health of the neighborhood will probably be endangered" thereby. The testimony, at least, shows a probability that irreparable mischief would be done by the erection of the proposed dam. In such a case, a Court of Chancery will not make subtle distinctions and refuse relief merely because there is a bare possibility that the evil may be avoided.—*St. James' Church v. Arrington, supra*.

PARKS & HUBBARD, *contra*.—No decree can be rendered against defendant, Croskey, as he denies, under oath, any interest, and the proof fails to show he is undertaking to erect the dam. There is no proof to show he is a party in any manner to the erection of the mill. This case is to be distinguished from a case arising under an application to the Probate Court to erect a dam; in this, that when a grist-mill is erected under such proceedings, it becomes a legal structure to the same extent as if established by legislative act, and cannot afterwards be abated, even though it should become a nuisance.—*Perry v. New Orleans, Mobile & Chattanooga R. R.* 55 Ala. 424; last paragraph 421, first and second paragraphs of opinion; High on Inj. page 292, § 523; Dillon on Munic. Corp. § 519, cited in *Perry v. N. O., M. & C. R. R. supra*. Hence, the law wisely declares that, if a mill-dam proposed to be erected under the statute will *probably endanger* the health of the neighborhood, it should not be erected. Code of 1876, § 2564 [3], and that without any reference to any public necessity there may be for it. But in this case, as the mill and dam, if erected, may afterwards be abated if they should become a nuisance, there is no necessity for the caution which the statute impliedly enjoins. The provisions of the Code above alluded to, do not affect the right of a man to build a dam "on his own hook, and, in this instance, on his own land." They provide a remedy in case such dam becomes a nuisance. Hence, McQuaggs has a right, without resorting to a writ of *ad quod damnum*, to erect the dam, being answerable as provided by the statute.—Code of 1876, § 3577; *Rosser v. Randolph*, 7 Port. 247.

Section 3577, *supra*, in declaring a remedy at law, by prosecution, excludes the jurisdiction of chancery.—High on Inj. 276, § 495.

The frame of the bill in this case, the averments, and the offered evidence, show that complainant undertakes to restrain a public nuisance. If so, he must show, in order to maintain his suit, that by the erection of the proposed dam he will suffer some injury distinct and separate from that suffered by

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the public.—*Perry v. N. O. & M. & C. R. R.*, *supra*; 2 Story Eq. Jur. § 924 (a); *Mayor of Columbus v. Snodgrass*, 10 Ala. 48, and last par. of opinion on page 49; High on Inj. §§ 521, 522, and note 1. Ogletree shows no such special injury.

But if the proposed dam is not made out a public nuisance, can complainant obtain relief on the idea that it is a private nuisance? The rule in such a case is as rigid as in the case of a public nuisance. It must be satisfactorily established to be a strong case of pressing necessity, to entitle a party to an injunction. A clear and plain case must be made out.—*Rosser v. Randolph*, *supra*; *St. James' Church v. Arrington*, 36 Ala. 548; *Ray v. Lyon*, 10 Ala. 64; High on Inj. §§ 486, 488, 489. "It will not suffice to show a probable or contingent injury, but it must be shown to be inevitable and undoubted."—High on Inj. § 495.

The right to restrain a nuisance can be lost by *laches*, and permitting its continuance for a length of time that would give right by adverse enjoyment.—High on Inj. §§ 494, 507, 508; *Rice v. Moore*, 38 Ala. 596. It appears from the answer and proof, that the structure proposed to be re-established stood for over ten years.

The evidence does not show such a strong case of pressing necessity as should authorize a Court of Chancery to interfere by injunction.

BRICKELL, C. J.—The bill is filed by the appellant to restrain the appellees from erecting, for the use of a grist mill they are constructing, a dam across a stream not navigable, running through their lands near to the city of Troy. The material averments are, that the stream upon which the dam is to be erected is formed by the confluence of two streams running through the city, draining a large part of it, and into which much of its sewage is discharged; that the mill is being constructed on the site of a former mill, and the dam will collect the waters on the site of the former pond, which has been disused for several years, and suffered to grow over with briars and other shrubs. The stream will afford but a scant supply of water during the summer and fall, and in operating the mill in those seasons, much of the ground covered by the pond will be alternately flooded and drained. The dam will cause much of the deposits from the drainage and sewage from the city to collect in the pond; there will be, in consequence of the undergrowth covering the pond, decay and decomposition of vegetable matter. These causes will generate malaria, producing disease in a large part of the city, and will be pernicious to the health of appellant and his family residing in the city near the confluence of the two streams.



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While the former mill was in existence, sickness did result from it, and the appellant lost three children, whose sickness and death, as he was advised by his physician, was from disease generated by the pond. The appellees have not made application to the judge of probate for an order to erect the dam, though it was known to them its erection would be resisted.

The appellee Croskey answers, denying that he is engaged or has any interest in the erection of the dam, or in the construction of the mill; states that he sold the lands to McQuaggs, who desired to rebuild the mill, and the sale being on credit, he retained the title as security for the purchase-money. McQuaggs answers, and denies the more material allegations of the bill; admits he is engaged in the erection of the dam and construction of the mill, without having made application for an order in the mode prescribed by the statute; admits appellant's residence with his family as stated in the bill, but denies that his health or that of his family can be affected by the dam. Much testimony was taken, to which reference is unnecessary, in the view of the case we are constrained to take. On the hearing, the Chancellor was of opinion the evidence did not show that the appellant would suffer any other injury from the dam, than such as his neighbors would suffer, and therefore decreed a dissolution of the temporary injunction and a dismissal of the bill.

The jurisdiction of the courts of equity to restrain the commission or continuance of nuisances, public or private, is settled, and has been of frequent recognition in this court. 1 Brick. Dig. 672, §§ 467-476. The ground of jurisdiction is the ability of the court to afford more complete remedies than courts of law can afford, bound and tied down to remedies they are not capable of moulding and adapting to the necessities of particular cases, thereby preventing irreparable injury, suppressing a multiplicity of suits, and avoiding vexatious and oppressive litigation. As the court is not in the exercise of its ordinary jurisdiction, but is interfering to supply the deficiencies of legal remedies, it interferes only when there is immediate, pressing necessity for the prevention of an injury, incapable of adequate compensation in damages at law, "or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which can not be otherwise prevented but by an injunction."—2 Story's Eq. § 925. The rules laid down by Lord Brougham in the leading case of *Earl of Ripon v. Hobart*, 3 Myl. & Keene, 169, respecting the exercise of the jurisdiction, have been here adopted. He said: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irrepara-

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ble mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and if need be, expedite the proceedings, the injunction being in the meantime continued. But, when the thing sought to be restrained is not unavoidably and in itself obnoxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question." It may also be laid down as a general proposition, that the court will not, unless the evidence is full, clear and convincing, take upon itself to decide that a thing which may or may not become a nuisance, will so operate, or that a nuisance in fact exists, without the trial of an issue at law.—*Cummings v. Barrett*, 10 Cush. 186; *Burnham v. Kenton*, 44 N. H. 78; *Eastman v. Company*, 47 N. H. 71; *Mason v. Sanborn*, 45 N. 171; *Jushbald v. Barrington*, 4 L. R. Ch. App. 388.

When the nuisance operates to destroy health, or to diminish seriously the comfortable enjoyment of a dwelling house, it is in its nature and consequences productive of irreparable mischief, for which the law can furnish no adequate remedy. High on Inj. § 491; 2 Story on Eq. §§ 926-7; *Holman v. Boiling Springs*, 1 McCarter, N. J. Eq. 343. The erection of dams, or other obstructions, in such manner as to affect materially the natural flow of the water to the manifest injury of the lands of other riparian proprietors, or to injure materially the health of those residing in the vicinity, the court has enjoined without awaiting the trial of an issue at law, or until there was a trial of the issue.—*Sprague v. Rhodes*, 4 R. I. 301; *Whitfield v. Rogers*, 26 Miss. 84; *White v. Forbes*, Walker (Mich.) 112. Every man has a right to the undisturbed enjoyment of his property, especially to dwell in his homestead freed from the peril of disease and death, caused by artificial constructions erected by his neighbor on his own lands, whatever may be the purpose of such constructions. The right is imbedded in the common law maxim of such frequent use—*sic utere tuo ut alienum non laedas*. For the preservation of health, and the protection of the undisturbed enjoyment of property, courts of equity in recent times have interfered upon the just and conservative principle, that it was better to prevent, than to undertake to cure or compensate for the evil, after it was wrought.—*Whitfield v. Rogers*, *supra*.

From the earliest period in our legislative history, it has been a fixed policy to provide a judicial proceeding by which



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it could be speedily ascertained before the erection of a dam on a water-course for the uses of a mill, gin, or other machinery, not only how far it would affect rights of property, but what would be its influence on the health of the neighborhood. A proceeding before the county court, on the application of the land owner, proposing to erect the dam, was authorized first by an act of the territorial legislature passed in 1811. The act was revised by an act adopted in 1812, and continued of force, with some changes, it is not necessary now to refer to, until the Code of 1852 became of force. It was declared unlawful for any person to erect a mill, so as to overflow any other mill, or create a nuisance in the neighborhood. When, as in this case, the person proposing to erect the mill and dam, owned the land on both sides the stream, on application, a writ of *ad quod damnum* was issued, commanding the sheriff to summon and empanel seven land holders or freeholders to meet upon the lands, and among other inquiries they were to make, was, *whether, in their opinion, the health of the neighbors will be materially annoyed by the stagnation of the waters.* Their inquest was returned to the county court, and if, upon that, or other evidence, it appeared to the court, *the health of the neighbors will be materially annoyed*, leave to build the mill and dam could not be given. Clay's Dig. 376-8, §§ 1, 16. The present statute authorizes like proceedings before the judge of probate, and of the inquiries the jury are required to make, is, *whether the health of the neighborhood will probably be endangered.* If, from the inquest, or other evidence, it appears such is the fact, the judge must not grant the application. Whoever erects a dam without obtaining an order therefor, is liable to double damages for any injury resulting therefrom.—Code of 1876, §§ 3555-79.

These statutes indicate very clearly, a settled policy to subordinate the right of the land owner to erect on his own lands, dams obstructing water-courses, to the preservation of the health of the neighborhood. Though they may be intended for lawful and useful purposes, authority for their erection can not be obtained if there is probability of danger to the health of the vicinage. The stagnation of water is of greater peril to health, in this latitude and climate, than in higher latitudes, and it is in view of this fact, these statutes have been enacted. In the exercise of its jurisdiction to prevent the erection of such obstructions, a court of equity would but follow the law, if a case is presented in which the evidence is not so clear and determinate that it can act safely, an issue of fact should be awarded to be tried by a jury. There should be much reluctance in subjecting individuals or com-



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munities to the dangers of disease. For injuries to property compensation may be made, after they have been suffered, but for injuries to health, no adequate compensation can be made; they are irreparable.

Without expressing any opinion as to the right of evidence in this case, there is enough in it to require that an issue to be tried by a jury should be directed. A continuance of the injunction will merely preserve the existing state of things, and can not work an injury to the appellees, for which they may not obtain adequate compensation in damages, by action on the injunction bond, if finally it shall be ascertained that the dam will not endanger the health of the neighborhood, or if it will, that it will not be of special injury to the appellant. We intend no relaxation of the general rule, that the court should not interfere with erections by a proprietor on his own lands, unless they are *per se* nuisances, working irreparable mischief; or if the erection is not of itself a nuisance, but is, *prima facie*, a legitimate exercise of his dominion over his own property, that it must be shown clearly the erection, if completed, will prove a nuisance, inflicting irreparable injury—injury irreparable of adequate compensation. Nor, do we intend a relaxation of the rule, that the court will not interfere, when the injury of which complaint is made and sought to be restrained, is doubtful or contingent, when the thing contemplated may or not prove noxious, according to the manner of its completion, and the mode in which it may be used. The legislation to which we have referred, requires that in the class of cases to which it relates, the jurisdiction of the court should be adapted to, and exercised, in view of its policy. In determining whether a temporary injunction to restrain a *threatened* nuisance should be continued or dissolved until the fact of nuisance is satisfactorily ascertained, regard must be had to all the circumstances of the particular case, the nature and character of the injury apprehended, and then the test should be applied—ought the party complaining to be protected, or required to submit until the fact of nuisance is ascertained and experience shows whether he will be subjected to the injury apprehended.

If the deleterious consequences will result from the erection of the dam, which are stated in the bill, it will certainly be a public nuisance. But if it will also be as to the appellant a private nuisance—if it is of *special* injury to him—if it will materially affect the comfortable enjoyment of his home, and endanger the health of himself and family—that it will also affect others of his neighbors, does not lessen the injury he will sustain, nor merge it in that of which the public may complain.—2 Story Eq. § 924; *Millions v. Sharp*, 37 N. Y.

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611; *Mayor v. Rogers*, 10 Ala. 57; *Mohawk Bridge Co. v. N. & S. R. R. Co.* 6 Paige, 554; *Crowder v. Tinkler*, 19 Vesey, 616.

The legal title to the lands residing in Croskey, he having an immediate right of entry thereon, and having made an executory contract of sale of them with full knowledge of the purposes to which McQuaggs intended devoting them, he was a proper, if not a necessary party to the bill.—Wood on Nuisances, § 822. Whether he shall be taxed with costs, will rest in the discretion of the Chancellor, and will materially depend upon his participation in the litigation.

The decree of the Chancellor is reversed, the temporary injunction reinstated, and the cause is remanded, that an issue of fact may be formed and tried by a jury to aid the Chancellor in ascertaining—1. Whether the erection of the dam will probably endanger the health of the neighborhood. 2. Whether the complainant will be thereby materially injured in the comfortable enjoyment of his dwelling, or the health of himself and family endangered.

## The City of Eufaula v. McNab.

### *Bill in Equity to Enforce Vendor's Lien.*

1. *Municipal corporation; who cannot bind.*—Neither the agents, officers, nor city council of a municipal corporation can bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized), is against public policy.

2. *Same; when bound by its agents or officers.*—A municipal corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation.

3. *Same; contracts of; when ultra vires.*—All contracts of municipal corporations, which are not necessary and proper in order to carry into effect the powers expressed in their charters, and which are not germane to the governmental purposes for which such corporations may have been organized, are *ultra vires*.

4. *Same; charter of; in case of doubt, how construed.*—In case of any doubt or ambiguity arising out of terms used in the charters of municipalities and counties, which are invested with civil policies, and political functions, the charters are strictly construed against the existence of such doubted power, and are resolved by construction in favor of the public.

5. *Charter of the city of Eufaula; section 24 of, construed.*—The charter of the city of Eufaula, entitled "An Act to establish a new charter for the city of Eufaula," approved February 28, 1870, (Session Acts 1869-70, pp. 186, 194), conferred "full power and authority upon the city council to purchase and provide for the payment" of "all such real estate and personal property as may be required for the use, convenience, and improvement of the city," &c. Acting under this power, the city council of Eufaula purchased a tract of land located within the corporate limits of the city, for the benefit of the S. E. Ala.

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A. & M. Ass., and as a place for holding "their annual fairs," and the association was given "the exclusive use of the premises." The consideration paid was \$10,000 of the bonds of the city, running twenty years and bearing interest from date with coupons attached. *Held*, that the action of the city council in making the purchase of the land for the particular purpose for which it was bought, was *ultra vires*.

6. *Same*; purchase of property in aid of private enterprise, not permitted.—Under such a power in a charter it is not contemplated, nor permissible, that such property shall be acquired in aid of any private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement.

7. *Municipal corporation*; right of to contract, how limited.—The right of a municipal corporation to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

8. *Estoppel*; when does not apply to municipal corporation.—When a municipal corporation makes a contract which is *ultra vires*, the fact that interest has been paid on the debt created by such contract, either by the corporation itself, or by the beneficiary of the contract, with the concurrence of the corporation, does not affect the case, and cannot work an estoppel.

9. *Bill to enforce vendor's lien*; when can not be retained after failure of its specific end.—Where the case made out by a bill is that of a vendor's lien, and the prayer of the bill is for the enforcement of the lien and a money decree for any balance due, it cannot, when it fails as to this specific end, be retained as a bill for rescission and cancellation.

APPEAL from the Chancery Court of Eufaula.

Heard before Hon. N. S. GRAHAM.

The opinion sufficiently states the facts.

HENRY R. SHORTER, for appellant.

JNO. M. McKELROY, and D. M. SEALS, *contra*.

(NOTE.—No briefs have come into the hands of the Reporter.)

SOMERVILLE, J.—The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, *can not bind the corporation* by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. The doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate



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both the reasonableness and necessity of the rule, that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, *keep within the limits of the chartered authority of the corporation.*"—1 Dillon on Municipal Corp. (2nd Ed.) § 381.

Municipal corporations, it is obvious, can exercise only such powers as are expressly granted in their charters, and such as may be necessary and proper in order to carry such express or direct powers into effect; but these powers include those which are indispensably necessary to the declared objects and germane to the governmental purpose for which such corporations may be organized.—*City Council v. Plank Road Co.*, 31 Ala. 76; *Mayor, &c. v. Yuille*, 3 Ala. 137; 1 Dillon on Mun. Corp. § 55; *Firemen Ins. Co. v. Ely*, (5 Conn. 560), 13 Amer. Decisions, 100.

All contracts, therefore, which are unauthorized by these principles are *ultra vires*, and impose no legal liability upon the corporations which purport to be bound by them. This is conceded to be a most salutary principle, and one of transcendent importance to the protection of the citizen against exorbitant and unauthorized taxation, imposed for ends entirely foreign to legitimate governmental purposes.—1 Dillon on Mun. Corp. § 55; § 381, *note* 2. To such an extent is this true, that the law rather favors the application of the doctrine of *ultra vires* to municipalities and counties, which are invested with civil, police and political functions, and in case of any ambiguity or doubt arising out of terms used in the charter, they are strictly construed against the existence of such doubted power, and are resolved by construction in favor of the public.—(Green's Bryce's *Ultra Vires*, p. 42, *note*; *Mayor, &c. v. Ray*, 19 Wall, 468; *Mintum v. Larue*, 23 How. 435; 1 Dillon Mun. Corp. § 55, *note* 1.) As said by the Supreme Court of Massachusetts, per PARKER, C. J., in *Stetson v. Kempton*, 13 Mass. 272, "it is important that it should be known that the power of the majority over the property, and even the person, of the minority, is limited by law to such cases as are clearly provided for, and defined by the statute which describes the powers of these corporations." *Ib.* 7 Amer. Dec. 145; 2 Kent's Com. 3 1, 292.

The charter of the City of Eufaula, entitled "an act to establish a new charter for the City of Eufaula," approved February 28, 1870, (Session Acts 1869–70, pp. 186, 194,) contains the following section:

Sec. 24. *Be it further enacted*, That the council shall have full power and authority to purchase, and provide for the payment of the same, all such real estate and personal property

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as may be *required* for the use, convenience and improvement of the city, &c."

Under the power supposed to be conferred by this section, the City Council of Eufaula, in the year 1872, purchased from the appellee, John McNab, thirty-four acres of land located within the corporate limits of the city, and a warranty deed was executed by McNab, conveying the same in fee simple to the city. The consideration paid was \$10,000 of the bonds of the city, running twenty years, and bearing interest from date, with coupons attached. This bill is filed to enforce the vendor's lien on the land for the accumulated interest, which amounts to about five thousand dollars, and also to fix the liability of the city of Eufaula for principal and interest of the bonds. The Chancellor made the decree prayed for, and ordered the sale of the lands for its payment, and the city of Eufaula appeals from this decree.

The question presented for our consideration is one of *ultra vires*, as to the corporate power of the city to make the purchase of this land for the *particular purpose* for which it is shown to have been bought.

It may be conceded, that, if the land in question had been purchased for an exclusively *public use*, as being designed for dedication to a purpose within the usual scope of municipal governments, it might be a proper exercise of corporate power under the above section, and the validity of the contract of purchase would not be affected, or rendered invalid, by any subsequent perversion of the land to unauthorized uses not shown satisfactorily to have been mutually intended at the time of the purchase.—2 Dillon on Mun. Corp, § 444 ; *Weismer v. Village of Douglas*, (64 N. Y. 91), 21 Amer. Rep. 586. But the terms of the charter are imperative, that such property must be "*required* for the use, convenience and improvement of THE CITY." Collateral advantages, incidentally resulting in the promotion of the city's commercial or business prosperity, will not be sufficient. It is not contemplated or permitted that such property shall be acquired in aid of any private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. As said by Mr. Justice Miller, in *Loan Association v. Topeka*, 20 Wall. 655, 660 : "It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it." The same view was expressed by BRICKELL, C. J. in the *N. O. M. & C. R. R. v. Dunn*, 51 Ala. 128, 136, where the following language is used : "The power of taxation thus conferred [by the charter] must be limited and con-

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fined strictly to the purposes for which the corporation is created. The revenues derived from the exercise of this power must be faithfully applied to these purposes. The corporate authorities cannot, without a violation of duty and usurpation of power, appropriate the revenues thus produced to any other purposes or objects than such as are fairly expressed or reasonably implied in the charter. It is not material what is the character of the object, or how pressing the necessity, or what are the benefits, real or imaginary, which may flow to the city. If not within the purposes of the act of incorporation, there is a want of power in the corporate authorities. It was said by the Supreme Court of Maine, in *Allen v. Inhabitants of Ivy*, 70 Me. 124, that "taxation, by the very meaning of the term, implies the raising of money for *public uses*, and excludes the raising if for *private* objects and purposes." "I concede," says Black, C. J., in *Sharpless v. Mayor*, 21 Penn. 168, "that a law authorizing taxation for any other than *public purposes*, is void."

It is useless to review in detail the evidence in this case as to the purpose for which this land was purchased. The scheme was manifestly inaugurated for the benefit of a private corporation, with the expectation, no doubt, of incidental advantages to the city of Eufaula, and with the belief, perhaps, that it would never necessitate municipal taxation for the debt created. The city ordinance of May 21, 1872, provided, "That his Honor, the Mayor, be authorized to have nine thousand seven hundred dollars, twenty years bonds, of the city of Eufaula, bearing eight per cent. interest, payable annually on the 1st day of December, printed *for the purpose of complying with the contract made with Mr. John McNab, FOR THE LAND TO BE USED by the South-East Alabama Agricultural and Mechanical Association.*" The evidence further shows that all the contracting parties fully understood that this land was really purchased by the city for the benefit of this agricultural association, as a suitable place for holding "their annual fairs," and that they had "the exclusive use of the premises." And the bonds, as printed and delivered to appellee, show on their face that they were given "for land embraced in the present *Fair Grounds* in said city;" a small difference of a few hundred dollars being paid in money.

We are of opinion that the city of Eufaula had no power to make this purchase for such a purpose. The city council, therefore, have no authority to levy taxes for the payment of the bonds, or the accumulated interest on them, and they impose no legal liability for their payment upon the municipality of Eufaula.—*Loan Association v. Topeka*, 20 Wall. 655; *Allen v. Inhabitants of Ivy*, (60 Me. 124); 11 Amer. Rep.



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185; *Lowell v. City of Boston*, (111 Mass. 454); 15 Amer. Rep. 39; *Hanson v. Vernon*, (27 Iowa, 28); 1 Amer. Rep. 215; *Railroad Co. v. Dunn*, 51 Ala. 128; *Weismer v. Village of Douglas*, (64 N. Y. 91), 21 Amer. Rep. 586.

The fact that two installments of interest were paid on the bonds, even had it been done directly by the City of Eufaula, instead of by the private corporation in possession of the land, with the city's concurrence, does not affect the case, and cannot work an estoppel.—*Loan Association v. Topeka*, *supra*. The ground upon which corporate contracts beyond the scope of charter powers are deemed invalid, seems to be, that it would be contrary to a sound public policy to permit their enforcement.—*Fireman Ins. Co. v. Ely*, 13 Amer. Dec. 108, *note*. To permit the doctrine of estoppel to apply to such cases, as forcibly suggested by STONE, J., in *Savings Bank v. Duncan*, 54 Ala. 481, would be "clothing corporations with the ability to increase their powers indefinitely by sheer usurpation."

This view of the case compels a reversal of the Chancellor's decree, and the dismissal of the bill. Under the present frame of it, we do not think it can be retained as a bill for rescission and cancellation. The case here designed to be presented is that of a legal and valid sale of lands by the complainant to the city of Eufaula, and the issue by the latter of valid and binding obligations for the purchase-money. The prayer is for the enforcement of the vendor's lien, and a money decree for the balance.

The case made by a bill for rescission and cancellation would be a new one. It must aver that the sale was void, and the issue of the bonds *ultra vires*. The prayer would be for the cancellation of the contract, and must be accompanied with an offer to surrender the bonds to the defendant. It is true that a bill may be framed with a double aspect, or in the alternative, but either of the aspects must entitle the complainant substantially to the same relief. But when a bill is filed for one purpose and it fails to this specific end, it can not be retained so as to change it into a bill for another distinct purpose. It cannot be so amended as to make a new case. Nor can relief be granted under the general prayer entirely distinct from, and repugnant to the special relief prayed. And for a like reason, no amendment is allowable introducing a special prayer for relief inconsistent with the original prayer, and not agreeable to the case made by the bill.—*Thomason v. Smithson*, 7 Port. 144; *Micou v. Ashurst*, 65 Ala. 607; *Adam's Eq. (star page) 309, note*; 1 Dan. Ch. Prac. 383-6.

The decree of the Chancellor is reversed, and a decree

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here entered dismissing the appellee's bill at his costs, in this court and the court below. This is without prejudice to the right of complainant to file another bill, such as may be authorized by the facts of the case.

## Copeland v. Kehoe & Ramsey.

### *Bill in Equity to Enforce Mechanic's Lien.*

1. *Effect of recording a conveyance upon contracts made prior to the registration, and subsequent to the execution of the conveyance.*—A conveyance recorded within the three months allowed by statute for its registration, has relation to, and takes effect from the day of its execution.

2. *Mechanic's or builder's lien law; how construed.*—A builder or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it, and the courts cannot extend the statute to meet facts and circumstances for which the statute itself does not provide, but which the courts think of equal merit with those provided for by the statute.

3. *Act approved April 19th, 1873; construction.*—The statute, by its own terms, limited the lien to the title or estate of the party contracting for the improvements.

4. *Same; when lien is created by.*—The lien created by the statute being an incident to an express contract, it follows of necessity, where there is no valid contract, there is no lien.

5. *When husband contracts on his own responsibility for improvements on his wife's estate.*—When the husband, on his own responsibility, contracts for the improvement of his wife's estate, mere silence or failure on her part to dissent from the contract, cannot be construed as an intention to bind her estate in payment.

### APPEAL from Barbour Chancery Court.

Heard before Hon. NEIL S. GRAHAM.

In 1873 Kehoe & Ramsey contracted, in writing, with William P. Copeland to build the brick work of a warehouse in Eufaula. The work was completed by Kehoe & Ramsey, and approved by Copeland, but the latter failed to pay the entire amount due on the work. The bill was filed to compel an account between Copeland and Kehoe & Ramsey, and to enforce the latter's lien upon the property by a sale. The answer of Copeland averred ownership in his wife, and admitted the fact of a balance being due complainants. In October, 1874, complainants filed an amended bill averring that, on the 27th day of August, 1873, at the time they entered into the contract for the repairs with Copeland, they did not know that said Copeland had conveyed to his wife the lot upon which the brick structure was to be erected, as the deed was not recorded for some time after the contract

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was made, and the consideration of said deed was for love and affection, and the further consideration of the amount of money belonging to her separate estate, which the said Copeland intended to use in constructing said brick work; that said Mary Copeland frequently saw the work progressing, but never objected to its completion. An additional amended bill was filed, which alleged fraud in the conveyance from Copeland to his wife. The answers of said Copeland, and of his wife, went severally to show that the property was a part of the statutory separate estate of Mrs. Copeland, and that Wm. P. Copeland was acting on his own individual authority in contracting for the work done by complainants. On a final hearing, the Chancellor granted the relief sought by complainants at the April term, 1878. The decree is assigned as error.

A. H. MERRILL, for appellants.

G. L. COMER, *contra*.

BRICKELL, C. J.—This cause was before this court, at the December term, 1876, and it is reported in 57 Ala. 246. It was then declared the conveyance to Mrs. Copeland by her husband in satisfaction of his conversions of money, her statutory separate estate, was founded on a valuable consideration, and was not violative of the statutory provision, that “husband and wife cannot contract with each other for the sale of any property.” It was also said, if by operation of that conveyance, the premises became of the corpus of the statutory separate estate of the wife, it could not be charged with the payment of any other debt, than such as was contracted for articles of comfort and support of the household. Or, if the operation of the conveyance was to create an equitable separate estate, the premises could not be charged with the debt to the appellees upon the evidence found in the record, because it was contracted by her husband on his own credit, and not by her, or with her authority. It was further said, if the deed was fraudulent—if its purpose was to hinder, delay, or defraud the creditors of the husband, it could not be supported.

The bill has since been amended by the introduction of allegations that the recital of consideration in the conveyance was feigned and false, and that there was for it no valuable consideration; that at the time of its execution the grantor was insolvent, and made the conveyance in contemplation of contracting the debt with the appellees, and avoiding its payment; and that in fact the conveyance was not delivered



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to the grantee until after the contract for building the store-house had been made with the appellees. These allegations are denied by the answers, and we are of the opinion, disproved by the evidence.

The case is reduced to a single inquiry—whether the appellees have a statutory mechanic's or builder's lien which can be enforced against the premises. The statute of force creating and declaring a mechanic's and builder's lien, when the contract for building the store house was made, was the act approved April 19, 1873, amendatory of sections 3101, 3102, 3104, of the Revised Code of 1867. The first section in general terms declared a prior lien upon the tract, parcel or lot of land on which buildings, inclosures, or fixtures were erected, and on the buildings, inclosures, or fixtures for the price agreed upon, or compensation to be paid, and materials used in the construction thereof, unless the lien was waived by agreement in writing. The second section declared the lien was effectual against the title of the party contracting for the building, whether it was legal or equitable, a freehold or less estate. The third section required for the preservation of the lien, the commencement of an action at law, or a suit in equity for its enforcement, within twelve months after the completion of the work, or supply of materials.—*Pamph. Acts 1872-3*, p. 117.

The first proposition urged by the appellees in support of the lien is, that the contract under which it originates, and from which it is derived, though made subsequent to the conveyance to Mrs. Copeland, was made prior to its registration, when they had no notice of the conveyance, were without knowledge of any fact, which would put them on inquiry, and without means of ascertaining its existence. If we were to concede the appellees stood in the relation of purchasers, having a lien from the time of the contract, and not solely from the time the work was commenced, the conveyance having been delivered into the office of the probate judge, for registration, within three months from its execution, would prevail over the lien. The statute (*Code 1876*, § 2166), prescribes three months from this date, as the period within which conveyances of unconditional estates, mortgages, &c., must be recorded, to preserve their priority over subsequent conveyances, or liens. A conveyance recorded within that period has relation to, and takes effect from the day of its execution.—4 *Kent*, 532; *Wade on Law of Notice*, §§ 102, 225; *Claiborne v. Holmes*, 51 *Miss.* 146.

The next proposition relied upon, is, that Mrs. Copeland had knowledge of the contract under which the store house was being built, suffered the building to proceed without as-

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serting any claim to the premises; without communicating to the appellees the fact that title resided in her; and has since taken and enjoyed all the benefits which are derived from the improvements, and should not now be permitted to deny the claim of appellees to a lien for compensation for their labor and materials. A builder's or mechanic's lien is purely statutory. Its character, operation and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar, particular, special remedy given by statute, founded and circumscribed by the terms of its creation, and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances, which they may believe present a case of equal merit, or a necessity of the same kind, as the cases or necessities for which the statute provides.

The statute of force when the present contract was made, obviously contemplated the lien should exist only where there was an express, as distinguished from an implied contract, under which the work was done, or the materials furnished. It is a *lien for the price agreed upon, or compensation to be paid*, the statute declared. The statute by its own terms limited the lien to the title or estate of the party contracting for the improvements. The land itself, or the improvements, without regard to the ownership, is not subjected to the lien. If it had been, the owner, by the mere act of a stranger, could have been improved out of his estate. The contract for the building in this case was in writing, made by the husband alone, upon his own credit and responsibility, not as the agent or trustee of his wife. Indeed, the appellees were contracting in ignorance of the wife's title, and in ignorance completed the work. This ignorance they now claim was superinduced by the *laches* of the wife. If the premises are to be taken and deemed the statutory separate estate of the wife, it must be borne in mind, that as to such estate, she is not a *feme sole*. While her capacity to take and hold property is enlarged by the statutes, her power of administration, and her capacity to contract, as known and defined at common law, are not enlarged, save for the purposes of alienating, by sale, the estate, and the alienation must be in writing, the joint act of herself and of her husband, attested by two witnesses, or acknowledged before a proper officer.—*Pickens v. Oliver*, 29 Ala. 528; *Alexander v. Saulsbury*, 37 Ala. 375. Estoppels *in pais* can not be raised against her in reference to the statutory estate.—*Canty v. Sanderford*, 37 Ala. 91; *Warfield v. Ravisies*, 38 Ala. 518; *Walls v. Grigsby*, 42 Ala. 473. It was an inflexible rule of the common law, that a *feme covert* could not bind herself by an executory contract. All

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her executory contracts were void absolutely, not voidable merely. In view of the construction, judicial decision has fastened upon the statutes which create and define the separate estate of a married woman, this rule of the common law has undergone no material change or modification. A liability is by the statute fixed upon the estate for articles of comfort and support of the household. But not because the liability springs from any contract made by or with the wife. It is unimportant whether the wife or the husband is the agent through and by whom the contract is made; the liability springs from the consideration of the contract, and not the agency through which it may be made.—*Durden v. McWilliams*, 31 Ala. 442; *Bender v. Meyer*, 55 Ala. 576; *Mitchell v. Dillard*, 57 Ala. 317. The lien created by the statute being an incident to an express contract, it follows of necessity, where there is no valid contract there is no lien.—*Kerby v. Tead*, 13 Metc. 149; *Rogers v. Phillips*, 8 Ark. (3 Eng.) 366; *Silley v. Casey*, 6 Mo. 166; *Fetter v. Wilson*, 12 B. Mon. 90.

But, suppose we regard the premises as the equitable separate estate of the wife, as to which a court of equity treats her as *sui juris*, having as full capacity to bind it as if she were a *feme sole*, not being restrained or limited by the instrument creating it. It is her own contracts, her own acts, which will bind the estate, and not the acts or contracts of her husband. If she, in her own name, or if her husband, having authority from her, as her agent, had entered into this contract, treating the premises as her statutory estate, it may be conceded the statute would have created a lien, the appellees could have enforced. The contract was not made by, or for her; any intendment, or implication, or inference, that in making it, the husband was acting for her, or that the appellees intended to contract with her, is excluded by the terms of the contract, and all the attendant circumstances. All that can be imputed to the wife, is knowledge that the building was being constructed under the contract her husband had made personally, and upon his own credit and responsibility. It would be a harsh rule, that would imply from her mere silence in reference to her title, or from her failure to dissent from the contract of her husband an approval of it, and an intention to bind her estate for the payment of the compensation he had promised. Her estate, under the operation of such a rule, would be restored to the common law dominion of the husband, from which it is the very purpose of the instrument creating the estate, to disembarass, relieve and free it. The case, as it is presented, is wanting in every element of an affirmative contract by the wife, or of facts which are sufficient to imply a contract by



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her, if the statutory lien was capable of extension to an implied contract.—*Fetter v. Wilson*, 12 B. Monroe, 90 ; *Sawyer v. Bandow*, 43 Wise, 556 ; *Hughes v. Peters*, 1 Cald. (Tenn.) 67 ; *Bliss v. Patton*, 5 R. I. 476.

The lien, as we have said, is effectual and capable of enforcement only against the estate of the contractor or employer. Whether the premises are the statutory or equitable separate estate of the wife, the husband had no estate or interest liable for the payment of his debts, or on which a lien could be created. Under the present statute (Code of 1876, § 3440), a married woman may contract for improvements on her real estate, and subject it to a mechanic's lien. *Ex parte Schmidt*, 62 Ala. 252 ; *Schmidt v. Joseph*, MSS.

The decree is reversed, and a decree must be here rendered dismissing the bill at the costs of the appellees in this court, and in the Court of Chancery.

## Nettles v. Nettles.

### *Bill in Equity to Establish a Resulting Trust in Land.*

1. *Wife's interest in lands purchased by her husband with money belonging to her statutory separate estate.*—When a husband invests the money of his wife, belonging to her statutory separate estate, in lands, and takes the title in his own name, an equity at once arises in the wife's favor either to charge the lands with the payment of the money or to claim the lands themselves by way of a resulting trust.

2. *Same; equity, how created.*—The equity is not a direct or express trust which can be created only by instruments in writing, duly signed by the grantor, or declared, but is one that results by implication or construction of law.

3. *Relation of husband and wife to the subject of the trust.*—The husband is invested with the legal title with every apparent indicium of ownership, while the wife enjoys a mere equity, which she may assert or not at her election.

4. *Constructive trusts; may be barred by statutes of limitations.*—These implied or constructive trusts have been uniformly construed to come within the operation of the statutes of limitations.

5. *Same; what a bar to assertion of, by wife.*—Such secret trusts are discountenanced by the courts where there has been unreasonable laches in their operation, and gross laches in assertion will debar relief entirely. If a beneficiary sleeps upon his rights with a full knowledge of a clear breach of trust, he will be left to "bear the fruits of his own negligence or infirmity of purpose."

6. *Same; effect of staleness of demand.*—The doctrine of staleness in a demand will often authorize a Court of Chancery to refuse relief to a complainant in cases where no statute of limitations applies.

7. *Policy of the law.*—It is of the utmost moment that there should be some end of law suits, and reasonable diligence in the assertion of one's rights is properly exacted, not less than the exercise of conscience and good faith.

[Nettles v. Nettles.]

8. *Distinction between the effect of lapse of time in asserting the equity where the trusteeship is uniformly admitted to exist, and where its existence is repudiated.*—When the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim by the trustee, lapse of time constitutes no bar to relief. But where the trust relation is repudiated or time and long acquiescence have obscured the nature of the trust, a court of equity will refuse relief upon the ground of its inability to do complete justice.

APPEAL from Wilcox Chancery Court.

Heard before Hon. CHARLES TURNER.

The facts appear in the opinion.

R. GAILLARD, and BRUTUS HOWARD, for appellant.

JOHN Y. KIRKPATRICK, for appellee.

No briefs came into the hands of the Reporter.

SOMERVILLE, J.—This bill is filed by James A. Nettles, as sole heir of his mother, Sarah C. Nettles, seeking to establish a resulting trust in certain lands alleged to have been purchased, during her coverture, with money belonging to her statutory separate estate. The lands were bought as far back as the year 1854, from one Gregg, the husband, Zach. E. Nettles making the purchase, and taking the title, by deed, in his own name, without words indicating the existence of any trust. There is no legal evidence introduced to prove the wife's ownership of the consideration money used in making the purchase, except that of the husband himself, and the evidence is conflicting as to the claim of the husband to the personal ownership of the lands. It also appears that the wife's claim was sometimes asserted, and at other times she was silent under a claim of ownership interposed by the husband. They both resided on the premises the greater part of the time, up to the date of her death, in July, 1878. She failed during her life, for a period of about twenty-four years, to set up any trust in the lands through the medium of the courts, and this bill was filed by her son, the complainant, for that purpose after her death, on September 9th, 1878. Averments are made dispensing with the necessity of any administration on the estate of Mrs. Nettles, who died free of debt, and leaving complainant as her sole heir and distributee. — *Fretwell v. McLemore*, 52 Ala. 124.

There can be no question of the proposition, that where the husband invests the money of the wife, belonging to her statutory separate estate, in lands, and takes the title in his own name, an equity at once arises in her favor, either to charge the lands with the payment of the money, or to claim

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the lands themselves, by way of a resulting trust.—*Tilford v. Torry*, 53 Ala. 122 ; 1 Perry on Trusts, § 127.

Such an equity is not a direct or express trust, which can be created only by instrument in writing duly signed by the grantor or declarant.—Code, 1876, § 2199. It is one which results by implication or construction of law. The husband is invested with the legal title, with every apparent *indicium* of ownership, and with a mere equity in the wife, which she may assert or not at her election. Such implied or constructive trusts, resting for their creation in the support of parol evidence, have been uniformly construed to come within the operation of statutes of limitations, from which express trusts are usually exempt.—*Turleton v. Goldthwaite*, 23 Ala. 343 ; 2 Brick. Dig. p. 218, § 11.

And for manifest reasons, it seems settled, that, even though the lapse of time, or other circumstances, may not authorize or effect a bar by limitations, such secret trusts are discountenanced by the courts where there has been unreasonable *laches* in their assertion.—2 Story's Eq. Jur. § 1520. This is upon the principle of *staleness* of demand, a defense which is peculiar to courts of equity, and may be made available as a defense without being specially pleaded.—*James v. James*, 55 Ala. § 525. Gross *laches* on the part of the *cestui que trust*, according to well established principles of equity jurisprudence, debars any relief at the hands of a court of equity. If a beneficiary sleeps on his rights, with a full knowledge of a clear breach of trust, or other misconduct on the part of the trustee, he will be left to "bear the fruits of his own negligence or infirmity of purpose."—2 Story's Eq. Jur., § 1884 a ; *Hume v. Beale's Ex'x.*, 17 Wall. 336, 248.

This doctrine of *staleness* in a demand will often authorize a Court of Chancery to refuse relief to a complainant, in many cases, where no statute of limitations applies. It is founded, in its origin, upon a sound public policy, which has a just regard for the preservation of the peace of society. It is of the utmost moment that there should be some end of law suits, an unreasonable encouragement of which is disastrous to the welfare of any government. Hence, *reasonable diligence* in the assertion of one's rights in the courts is properly exacted, not less than the exercise of conscience and good faith. *Johnston v. Johnston*, 5 Ala. 90-97 ; *Smith v. Clay*, 3 Brown Ch. 639.

It is true, as a general rule, that where the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief. But where the trust relation is repudiated, "or time and long ac-



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quiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance; in all such cases, a court of equity will refuse relief upon the ground of the lapse of time, and its inability to do complete justice." 2 Story's Eq. Jur. § 1520a.

The husband and the wife, it is true, were, for a great portion of the time, in possession of these lands together, and in ordinary cases, where there is no conflicting claim of proprietorship, the possession of the husband would be referred to his representative character, and regarded as the possession of the wife, notwithstanding the principle that possession is usually referred to the legal title.—*Robinson v. Robinson*, 44 Ala. 227; *Brunson and Wife v. Brooks*, MSS. Dec. T. 1880. Here the husband converted the wife's money to his use by the purchase of land with it, in his own name. The evidence is conflicting and unsatisfactory as to the claim of Mrs. Nettles to these lands, and of his recognition of her equitable rights. He certainly exercised acts of ownership over them inconsistent with her claim, which could not have been without her knowledge. He represented to the appellees, Perryman & Co., that the lands were his, and they extended him credit on the strength of his reputed ownership, which was asserted with the wife's knowledge. He made an affidavit of personal ownership in order to rescue a homestead in the lands from sale under execution. The peculiar *status* of the title was known to the wife, and yet she took no steps to assert her equity, or to have the legal title divested out of the husband.

We are of opinion that this protracted sleeping on her rights for a period of twenty-four years, under these circumstances, was fatal to her claim. Her equity is a latent one, such as is not encouraged by the courts as against the adverse claim of creditors, especially those holding a lien. She failed to prosecute her demand during her lifetime, and by continued acquiescence has allowed it to become stale. In her failure to assert it, we do not think the *complainant* can be permitted to do so, at least to the prejudice of the husband's creditors, after so great a lapse of time.—Angell on Lim. § 471. To encourage latent and stale claims of this character would be contrary to the policy of our recording statutes, and prove greatly detrimental to the safety of land titles in the State generally.—*McArthur v. Carrie's Adm'r*, 32 Ala. 75.

We leave out of view any consideration of the deed of September 22, 1873, made by Zach. Nettles to his wife, and the complainant, his son. It is not set up in the bill as the basis of any relief, and is not relied on by the complainant.

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Its recited consideration, furthermore, is "natural love and affection," and parol evidence, in the absence of fraud or mistake, is not admissible to show a consideration of past indebtedness, which is variant and different from that expressed.—*Adams v. Thomas*, 54 Ala. 175; *Hair v. LaBrouse*, 10 Ala. 548.

We are not willing, under the facts of this case, to reverse the finding of the Chancellor, and his decree is accordingly affirmed.—*Tilford v. Torry*, 53 Ala. 120.

## Johnson et al. v. Ray.

### *Petition for Sale of Lands for Partition.*

1. *Partition; proceedings for sale of land for, on petition not containing jurisdictional averments, is void.*—A proceeding before the probate judge for the partition of land among several joint tenants, or tenants in common (Code, § 3514), is *coram non judice* and void, when the petition does not contain the averments necessary to give the court jurisdiction.

2. *Same; when petition for sale of lands for is fatally defective.*—In this case the petition is fatally defective, because it does not appear to have been filed by any person entitled to ask a partition; and because it does not set forth the interest of each tenant in the land; and because it does not specify the number of shares into which the land or money is to be divided.

APPEAL from the Probate Court of Cherokee.

Heard before Hon. James H. Leath.

On October 7th, 1878, Teague H. Ray filed a petition in the Probate Court of Cherokee county, the material averments of which were as follows: "That Isaac L. Ward, late of said county, has been dead more than two years, and that at his death he was seized and possessed of the following described lands (describing them); that no administration has been had on the estate of Isaac L. Ward, deceased; that T. L. Ward, who is over twenty-one years of age, resides at Comanchie, Texas, Martha Ray, wife of T. H. Ray, Roxanna Johnson, wife of W. L. Johnson, Amanda Aiken, wife of Archibald Aiken, Mary Johnson, wife of Iredell Johnson, Isaiah Johnson, Martha Greer, John and Amanda Ward, and Sarah Sandford, all of whom are over twenty-one years of age and reside in Cherokee county, Alabama, and William Ward, who is over twenty-one years of age, and resides at Greenbriar, Arkansas, are the sole heirs and distributees of said estate of Isaac L. Ward; that said lands cannot be fairly, equitably or beneficially divided among the heirs and

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distributees of said estate without a sale thereof; that petitioner and his wife are distributees of said estate and entitled to one twenty-first part of said lands or the proceeds of the sale thereof; that it is necessary to sell said lands for distribution. The premises considered, the petitioner prays that notice may be given, &c., and that on the final hearing your Honor will grant an order decreeing said lands to be sold."

Testimony was taken, a sale ordered to be made by commissioners appointed by the court for that purpose, and the sale made and confirmed. Thereupon several of the heirs filed a motion to set aside the sale, because it was void, not having been made on the application of any of the joint owners or tenants in common of the lands, or by a guardian or lawful representative of any one of the joint owners or tenants in common of the lands, and because the purchaser of the lands had notice of these facts. The court overruled this motion, and its action in doing so is the error assigned.

WALDEN & SON, for appellants.

McCONNELL & SAVAGE, for appellee.

STONE, J.—The present appeal grew out of a statutory proceeding to obtain a sale of lands for partition, under section 3514 of the Code of 1876. To render such proceedings valid, the petition must contain enough to give the court jurisdiction.—1 Brick. Dig. 939, §§ 351, 356.

The petition in the present case is fatally defective, in the following particulars: First, The proceeding is not on the application of the persons entitled thereto, or of any one of them.—Code, § 3497. Second, The petition does not set forth the interest of each person—tenant in common—in the lands of which partition is sought; and, third, it does not specify the number of shares into which the land or money is to be divided.—Code, § 3498.

The Probate Court never having acquired jurisdiction in the premises, the whole proceeding is *coram non judice* and void, and should have been so declared in the Probate Court. *Whitman v. Reese*, 59 Ala. 532; *Jones v. Brooks*, 30 Ala. 588.

Reversed and remanded, that the Probate Court may make an order, vacating and annulling the order of sale.



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## ADVERSE POSSESSION.

1. *Adverse possession; when vendee of lands does not hold.*—The possession of the vendee of lands, who holds under an executory contract of sale, is not adverse to his vendor, until the purchase-money is paid, or until, by the terms of the contract, he is entitled to demand a conveyance of the legal title. *Potts v. Coleman*, 221.
2. *Same; court pronounces on facts constituting.*—The onus is on one who seeks protection as an adverse possessor, to show a hostile possession, but the court pronounces, as matter of law, the facts which enter into, and constitute such a possession. *Ib.* 221.
3. *Same; what characterizes claim of title constituting.*—The claim of title, which is an indispensable element of adverse possession, has in it nothing of stealthiness, nor is it elastic, or flexible; there must be publicity, continuity, and good faith in its assertion, leaving no room for doubt by the person against whom it is asserted, that his title is disputed, and a hostile title asserted. *Ib.* 221.
4. *Same; when purchaser of lands at executor's sale does not hold.* When, at a sale of lands made by an executor under orders of the Probate Court, a conveyance is made to the purchaser, without a report of confirmation of the sale, without a report that the purchase-money had been paid, and without an order of the court to make titles, such a conveyance will be ignored, and the purchaser does not hold adversely, so that his possession will ripen into a title by the expiration of ten years. *Casey et al. v. Morgan et al.* 441.

## ASSIGNMENTS.

1. *Assignment for benefit of creditors; construction of.*—Assignments for the benefit of creditors are subject to the same rules of construction which are applied to other contracts or conveyances, and the circumstances surrounding the parties when the assignment was executed, the motives leading to its execution and the objects to be accomplished, should, if there is a want of clearness in its terms, leaving the intention doubtful or uncertain, be regarded in construing them. *Bank of Mobile et al. v. Dunn et al.* 381.
2. *Same; description of debts included in.*—No narrowness or closeness of construction is adopted in assignments for the benefit of creditors; if, upon a fair and just interpretation of the terms of description of the debts included therein, they are broad enough to comprehend a particular debt which is not within its precise words, it is sufficient. *Ib.* 381.
3. *Same; rule applied.*—Where a debtor in failing circumstances assigned all his individual property for the benefit of his individual creditors, who were to be paid in full, directing the surplus to be applied equally to the payment of the debt due several named mercantile partnerships, of which he was a member, a debt due by another dissolved partnership not specially named, of which the assignor was a member, and whose debts on its dissolution he assumed and promised to pay, is an individual debt within the terms of the assignment. *Ib.* 381.

## ASSIGNMENT, GENERAL.

1. *General assignment; mortgage conveying substantially all debtor's property is.*—A mortgage conveying substantially all the debtor's property for the security of a particular creditor, or creditors, to the exclusion of others, the intention of which is to secure a preference to the former over the latter, operates as a general assignment for the benefit of all the creditors of the grantor equally. *Shirley et al. v. Teal, 449.*
2. *Same; age of debt not material when mortgage held to operate as.*—In such a case the mortgage operates as a general assignment, although it was executed to secure, in part, money to be advanced by the mortgagee to the mortgagor, since the statute prohibiting preferences makes no distinction as to the age of the debt. *Ib. 449.*
3. *Same; conveyance of exempt property not held to be.*—When a debtor conveys, by mortgage, substantially all his property, to a creditor, intending thereby, to give him a preference, it will not operate as a general assignment of any property which is exempt from levy and sale under execution. *Ib. 449.*
4. *Same; when decree declaring mortgage of exempted property to be, not erroneous.*—A decree declaring a mortgage which conveys, substantially, all the debtor's property to a creditor, in preference to his other creditors, to be a general assignment, is not erroneous, if the mortgage conveyed any property not exempt from legal process issued to enforce the mortgagor's debts. *Ib. 449.*

## ATTACHMENT.

1. *Attachment; ownership of property not changed by levy of.*—The ownership of chattels is not divested by the levy of an attachment on them. *Scarborough v. Malone, 570.*
2. *Same; lien created by levy of.*—The levy of an attachment creates an inchoate lien, dependent on the rendition of a judgment, and if judgment is obtained, the lien relates back to the levy and is superior to subsequent liens, transfers or alienations. *Ib. 570.*
3. *Same; lien created by levy of, not impaired by replevying property.*—The lien created by levy of an attachment is not impaired or destroyed by replevying the property. *Ib. 570.*
4. *Same; levy of second attachment; when wrongful.*—The subsequent levy of a second attachment, not in subordination to the lien of the first attachment, is wrongful, and it is wrongful for the sheriff to deliver the property to the plaintiffs in the second attachment. *Ib. 570.*
5. *Levy of second attachment; delivery of property to plaintiffs in; sureties on replevin bond, when discharged.*—The levy of a second attachment, discharges the sureties on the replevin bond in the former attachment from all liability. (*Cordaman v. Malone, 63 Ala. cited and approved.*) *Ib. 570.*
6. *Attachment; liability of sheriff for non-feasance or misfeasance in levying.*—A sheriff is liable for misfeasance or nonfeasance in the exercise of the powers conferred on him by law. And, where a sheriff seized property under a junior attachment, taking it from the possession of the sureties on the replevin bond in the first attachment, and thereby discharging them from their liability on such bond. *Held,* It was the duty of the sheriff to keep the property safe, so that it would be forthcoming to answer the first levy which was the prior lien. *Held further,* That the neglect of such duty was nonfeasance; and the delivery of such property to the plaintiffs in the second attachment suit, whereby they were enabled to exercise ownership over it, so that it could not be reached and subjected to the prior lien, was misfeasance, render-

ATTACHMENT—*Continued.*

- ing the sheriff liable to the plaintiffs in the first attachment for all the damages they sustained. *Ib.* 570.
7. *Sheriff; notice to, of levy by his predecessor, necessary to fix his liability.*—Where a prior levy is made, not by a sheriff but by his predecessor in office, notice to him of such levy is necessary to fix his liability. *Ib.* 570.
  8. *Attachment before justice; objections must be made before justice for irregularity in proceedings.*—On appeal to the Circuit Court, in attachment proceedings commenced before justices of the peace, no objections can be there raised to the irregularity of the proceedings, which was not taken before the justice, although if presented in time it might have been fatal to the proceedings, but a complaint filed in such a case in the Circuit Court, which is only an amplification of that previously filed in the justice's court, is unobjectionable. *Reynolds et al. v. Simpkins*, 378.

## ATTORNEY AND CLIENT.

1. *Attorney and client; what communications between are privileged.* Professional communications between attorney and client are regarded as confidential, and are protected on grounds of public policy; but the rule does not extend to communications openly made in the presence of third persons, nor can the attorney refuse to disclose by whom he was employed in a judicial proceeding. *Mobile & Montgomery Railway Co. v. Yeates*, 164.
2. *Attorney; authority to bind clients.*—An attorney may bind his client by a written agreement, as to any cause or proceeding, (Code of 1876, § 796), or by an entry on the minutes of the court; but the courts are prohibited (Rule 17, Code, p. 156), from acting on any verbal agreement made by attorneys in a cause or proceeding. *Norman v. Burns*, 248.

## BANKRUPTCY.

1. *Statute of limitation in suits by assignees in bankruptcy; what embraced in.*—The provision of the bankrupt law declaring that no suit, either at law or in equity, "shall be maintainable in court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property, transferable to, or vested in, such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, (Rev. Stat. U. S. § 5957), applies not only to suits in which the assignee is the real and beneficial actor, but also to suits upon causes of action derived from him after the statutory bar is complete; and it extends to every cause of action existing when the assignment is executed to the assignee, and the right and title to sue in respect to which is derived from the assignment, and is independent of the State statute of limitations. *Moses v. St. Paul*, 168.
2. *When fraudulent concealment of facts will take case out of statute.* Fraudulent concealment of facts by the bankrupt, until after the completion of the statutory bar, will take the case out of the operation of the statute of limitations, as against him or persons colluding with him, but not as against innocent persons claiming adversely to him. *Ib.* 168.

See HUSBAND AND WIFE, 6.

## BASTARDY.

1. *Bastardy; nature of the proceeding.*—Proceedings under the statute in a bastardy case, are *sui generis*, and while partaking of the na-



BASTARDY—*Continued.*

- ture of both a criminal prosecution and a civil suit, are *quasi* criminal. *State ex rel. Washington v. Hunter, 81.*
2. *Same; not misdemeanor.*—A proceeding to charge a person as the reputed father of a bastard child, is not a misdemeanor within the statutes, so as to be barred within "twelve months after the commission of the offense," under § 4634 of the Code. *Ib. 81.*
  3. *Bastardy; proceedings in not barred by any statute of limitation.* There is no statute of limitations in this State which bars a proceeding under the statute to charge the reputed father of a bastard child with its support, unless, in analogy to the doctrine of prescription, it is barred by presumption, after a period of twenty years from the birth of the child. *Ib. 81.*

## BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Promissory note of partnership; when onus on plaintiff to show assent of partners to.*—When a promissory note, purporting to have been executed by a partnership, is shown to have been signed by a partner in renewal of a note given for the debt of another firm of which that partner alone was a member, the *onus* is on the plaintiff to show the assent of the other partners to its execution. *Tyree v. Lyon, Murphy & Co. 1.*
2. *Same; assent of partner to, not implied from silence.*—This assent may be express or implied, but the mere silence of the other partners, when informed of the existence of the note, is not of itself evidence that they had assented to its execution. *Ib. 1.*
3. *Same; who is not bona fide holder of.*—One who knowingly takes the negotiable note of a partnership in payment of the individual debt of one of the partners, is not a *bona fide* holder or purchaser of such paper, and can not enforce it against the other partners. *Ib. 1.*
4. *Promissory note; possession of by maker evidence of payment.*—The possession of a promissory note by the maker, or one who succeeds to his rights, or estate, tends to show that it has been paid, or that such person has acquired the beneficial ownership of it, but the presumption may be repelled by evidence that the possession was acquired without payment, and evidence that another note of the same tenor was substituted for it, is admissible. *Potts v. Coleman, 217.*
5. *Same; maker of may insist that it was given without consideration.* The giving of a note, and making repeated promises to pay it, do not prevent the debtor from insisting that there was no consideration for the note, unless a new consideration had intervened, or the promise had induced some action on the part of the plaintiff, from which injury to him would follow. *Ware, Murphy & Co. v. Morgan & Duncan, 461.*

## BONDS.

1. *Supersedeas bond; execution of decree not superseded without a proper.*—Execution of a judgment or decree is not arrested or superseded by an appeal to the Supreme Court, unless a bond with sufficient sureties, payable and conditioned as prescribed by the statutes, is executed and filed. *Ex parte Sibert, 349.*
2. *Same; condition of, when decree for payment of money.*—When the judgment or decree is for the payment of money, the bond to supersede its execution, must be for double its amount, payable to the appellee, with sufficient sureties, and conditioned "to prosecute the appeal to effect, and satisfy such judgment as the Supreme Court may render in the premises." *Ib. 349.*
3. *Same; conditions of, when not for payment of money.*—But when the decree which is sought to be superseded, declares a lien on lands

BONDS—*Continued.*

for a specific sum of money, and orders the register to sell the lands for its payment after default, the bond, to operate as a supersedeas, must be framed and taken (under § 3928 of the Code) in such sum and with such condition as will indemnify and secure appellee from loss or delay in the execution of the decree, if it is affirmed, and if independent security for the costs of appeal is not given, it should also cover them. *Ib.* 349.

BURGLARY.

See CRIMINAL LAW.

CASES OVERRULED, LIMITED, EXPLAINED AND QUALIFIED OR FOLLOWED.

1. *Case overruled.*—The case of *The Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437, so far as it conflicts with this case, is overruled. *Gothard v. Alabama Great Southern R. R. Co.* 114.
2. *Cases overruled.*—The statement in *Sumner v. Woods*, 52 Ala. 572, as to the rights of a *bona fide* purchaser of the property in controversy here, is a mere *dictum*, that is contrary to the weight of authority and to the previous decision of this court in *Holman v. Lock*, 51 Ala. 287. That case, and the case of *Dudley v. Abner*, 52 Ala. 572, so far as they conflict with the principles decided in this case, are overruled. *Sumner v. Woods*, 139.
3. *Same.*—The case of *Crawford v. Kirksey*, 50 Ala. 590, is overruled. *Lehman et al. v. Meyer et al.* 396.
4. *Case followed.*—*Lee v. Lee*, 55 Ala. 590, followed in *Lee v. Lee*, 406.
5. *Same.*—*Rather v. Young*, 54 Ala. 94, followed in *Fort v. Davis*, 481.
6. *Cases explained.*—*Levert v. Read*, 54 Ala. 529, *Shelton v. Poulson*, 60 Ala. 578, explained in *Henderson v. Henderson's Adm'r*, 519.
7. *Cases approved.*—The cases of *Tanner v. L. & N. R. R. Co.* 60 Ala. 621, and *Gothard v. Alabama Great Southern R. R. Co.* are approved in *Cook, Adm'r, v. The Central R. R. and Banking Co. of Georgia et al.* 533.
8. *Case limited or qualified.*—The third head note in the case of *Gov't Street R. R. v. Hanlon*, 53 Ala. 70, is qualified or supplemented in *Cook, Adm'r, v. The Central R. R. and Banking Co. of Georgia*, 533.
9. *Case approved.*—*Cordaman v. Malone*, 63 Ala. 556, is approved in *Scarborough v. Malone et al.* 570.

CHANCERY.

I. JURISDICTION.

1. *Equity will not protect possession of land acquired by force.*—When possession of land is acquired by such force as to entitle the party evicted to maintain an action of forcible entry and unlawful detainer, equity will not entertain a bill founded on such possession, to enjoin the action, and to remove a cloud from complainant's title to the land.—*Turnley et al. v. Hanna*, 101.
2. *Creditor by simple contract; when may come into equity to enforce collection of his debt.*—A simple contract creditor cannot obtain the assistance of a court of equity to compel the payment of his debt, unless he has a lien which it is the province of that court to enforce, or his case is one of the particular class for which provision is made by the statute. *Moses v. St. Paul*, 168.
3. *Same; where the demand is legal, an equity must be shown.*—When the demand is purely legal, the creditor must show, in addition thereto, some clear, controlling equity, which he is entitled to enforce. *Ib.* 168.

## CHANCERY—Continued.

4. *Bill of review ; when statute of non-claim, no ground for.*—A bill of review, for error apparent on the face of the record, filed by the minor heirs of a decedent, on the ground that it appeared from the bill in the original suit, that the claim sought to be enforced thereby was barred by the statute of non-claim, cannot be maintained when it appears that the purpose of the original suit was to declare and enforce a lien on, and to recover an interest in, real property. *George v. George, 192.*
5. *Same ; what irregularity of service on infants not ground for.*—A bill of review for error apparent, will not lie at the instance of the infant defendants to the bill in the first suit, on the ground that the guardian *ad litem* appointed to represent them was not served with notice of his appointment, when it appears from the record, that he was appointed, that he filed his written consent to act, and put in an answer denying the allegations of the bill. *Ib. 192.*
6. *Same ; all presumptions are in favor of correctness of first suit.*—When a bill of review is filed for error apparent on the record, it is the duty of this court to presume everything in favor of the rulings of the court in the original suit, which the bill of review does not disprove. *Ib. 192.*
7. *When equity will not cancel conveyance at suit of purchaser under execution.*—A purchaser at sheriff's sale, under execution, of lands fraudulently conveyed by the judgment debtor, has a plain and adequate remedy at law by an action of ejectment, and cannot come into equity, while out of possession, to have the conveyance cancelled as a cloud on his title.—*Grigg v. Swindal, 187.*
8. *When equity will relieve against judgment at law.*—Although the jurisdiction is exercised cautiously, and sparingly, yet, if a party against whom a judgment at law has been rendered, shows by clear and precise allegations, supported by convincing proof, that he was without fault in failing to assert his legal rights or remedies, or has been prevented by fraud, accident, or surprise, or by the act of his adversary, from availing himself of them, and that the judgment is unjust, and oppressive, a court of equity will grant relief against it. *Norman v. Burns, 248.*
9. *When equity will not grant relief against judgment at law.*—A court of equity will not relieve against a judgment at law, merely because it is erroneous, or because the Chancellor, from the evidence, would reach a different conclusion ; nor will it grant relief on account of matters of pure legal cognizance, unless the party complaining acquits himself of all negligence in the assertion of his rights in the court of law, and the circumstances relied on to excuse the failure, must be shown to have been such that no exercise of diligence on his part could have guarded against them ; a want of diligence being as fatal as the want of a valid defense, or the absence of any fact rendering it unconscientious to execute the judgment. *Ib. 248.*
10. *Equity will not relieve against judgment at law on ground that attorney violated verbal agreement in taking it.*—A court of equity will not grant relief against a judgment at law, when the only defense was payment before its rendition, and the only reason shown for a failure to defend, was the verbal assurance of one of the attorneys for the plaintiff, that judgment would not be taken at the approaching term of court, and that he would correspond with his client, and try to secure an equitable adjustment of the controversy. *Ib. 248.*
11. *Bill in equity may be maintained by administrator of deceased wife against husband as her trustee for an account.*—The administrator of the deceased wife may maintain a bill in equity against the



CHANCERY—*Continued.*

- surviving husband, as trustee of her equitable separate estate, under an ante-nuptial contract to compel an account and settlement of the trust estate. *Donovan v. Haynie, Adm'r, 51.*
12. *Admission by husband of receipt of money of wife, sufficient to charge him.*—In the husband's answer to such a bill, his admission of the receipt of moneys belonging to the wife's estate is sufficient to charge him with the receipt of such moneys as trustee, and if he received it as a gift or loan, the *onus* of proving that fact is on him. *Ib. 51.*
  13. *Equity will enforce specific performance of a contract at the instance of a party who did not sign it.*—An agreement for the sale of lands, or any interest therein, which must be in writing, and subscribed by the party to be charged thereby, may be specifically enforced by a party who did not sign it, since by resorting to equity for this purpose, he adopts the agreement and renders it obligatory on him. *Chambers et al. v. Alabama Iron Co. 353.*
  14. *When specific performance of contract respecting lands is matter of right.*—When a contract respecting lands, or any interest therein, is in writing, is certain and fair, in all its parts, founded on an adequate consideration, and capable of being specifically performed, specific performance is a matter of right, and it is as much a matter of course for a court of equity to decree it, as for a court of law to award damages for its breach, and it will be decreed, not only between the original parties, but also between parties claiming under them, unless some controlling equity intervenes which renders it improper. *Ib. 353.*
  15. *Creditors at large ; had no relief in equity against debtors' fraudulent transfers.*—Before the passage of the statute (Code, § 3886) equity would not interfere to relieve creditors at large against fraudulent transfers made by debtors, until they had reduced their claims to judgment. *Lehman et al. v. Meyer et al. 396.*
  16. *Judgment creditors ; when relief granted to in equity against debtors' fraudulent conveyance.*—Equity would assist judgment creditors in obtaining satisfaction in two classes of cases: 1. When the debtor fraudulently conveyed property on which the judgment was a lien. 2. To reach property not subject to execution at law ; but in the second class the creditor must, before resorting to equity, have exhausted his legal remedies, while in the first class, he need not have done so. *Ib. 396.*
  17. *Decedent ; equity grants relief to creditors against fraudulent transfers made during life.*—Equity would also interfere for the relief of creditors who had not reduced their claims to judgment, or exhausted legal remedies, where a debtor had made fraudulent transfers of his property in his life time, and the remaining assets were insufficient for the payment of his debts. But this jurisdiction depends on the power of the court to marshal the assets of deceased persons, and was independent of the jurisdiction to which the creditors of a living man could resort. *Ib. 396.*
  18. *Simple contract creditors ; statute extending relief to, against fraudulent transfers by debtor construed.*—The statute (Code, § 3886) allowing creditors without a lien to go into equity to reach property fraudulently transferred by debtors, is remedial, and must be construed in the light of the pre-existing law, and given effect according to the legislative intention ; thus reading and construing it, simple contract creditors have the same right under it, as judgment creditors would have had before its enactment, to invoke the aid of equity to reach property fraudulently conveyed. *Ib. 396.*
  19. *Property fraudulently conveyed may be pursued in equity by creditors,*

## CHANCERY—Continued.

- although the creditor has other property.*—Although it may appear on a bill filed by simple contract creditors to reach property fraudulently conveyed by the debtor, that the latter has other property sufficient to pay the debt, yet the creditor may pursue such property, and the fraudulent grantees can not compel a marshalling of the assets, so as to relieve the property not conveyed before charging the property claimed by them. *Ib.* 396.
20. *Equity will interfere to prevent removal of mortgaged property out of the State.*—A court of equity will interfere, before the law day of the mortgage, and before the mortgagee has a right to proceed at law, and restrain the removal of the mortgaged property beyond the jurisdiction of the court. *Walker v. Radford*, 446.
  21. *Seizure, writ of; allowed under statute to prevent removal of mortgaged property.*—When a case for equitable interference is shown, the statute (Code, §§ 3857–3853) authorizes a writ of seizure to prevent the removal of mortgaged property beyond the State, instead of an injunction, which would be the appropriate remedy in the absence of the statute. *Ib.* 446.
  21. *Removal of mortgaged property out of the State; ground of equity to prevent.*—The ground of equitable interference, in such cases, is the prevention of injury to the present or future rights of the mortgagee, and the injury must be shown, and it must appear that the mortgagor, or those claiming under him, have done, or are about to do, some act which violates the mortgagee's rights and beyond the rights of the mortgagor, and for which the law does not give an adequate and appropriate remedy. *Ib.* 446.
  22. *Same; temporary removal of property no ground for equitable interference.*—But the mortgagor is not to be hindered in the legitimate use of the property, and a mere temporary removal of the property out of the State, accompanied by an honest intention to return it before the law day of the mortgage, and without any intention to affect, embarrass, or impair the rights of the mortgagee, will not authorize a court of equity to interfere by injunction, or the statutory writ of seizure, to prevent the removal of the property. *Ib.* 446.
  23. *Administration of estate may be removed into chancery when trusts to be executed.*—Where there are trusts to be executed under the provisions of a will, which are to be continued for a term of years, and the estate is to be kept together, this is sufficient to authorize the removal of the administration into chancery at the instance of the executor. *Maybury v. Grady et al.* 147.
  24. *Bill to enforce vendor's lien; when can not be retained after failure of its specific end.*—Where the case made out by a bill is that of a vendor's lien, and the prayer of the bill is for the enforcement of the lien and a money decree for any balance due, it cannot, when it fails as to this specific end, be retained as a bill for rescission and cancellation. *The City of Eufaula v. McNab*, 588.
  25. *Bill of interpleader; complainant must stand as stake-holder between claimants.*—In order to maintain the complainant in a bill of interpleader must show, to maintain it, that he has no interest in the controversy to be waged between the claimants, is indifferent between them, and stands in the relation of a mere stake-holder, or depository. *Conley et al. v. Alabama Gold Life Ins. Co.* 472.
  26. *Same; cannot be maintained when claims arose by wrongful act of complainant.*—A court of equity will not interfere by bill of interpleader for the relief of one who stands to either of the claimants in the relation of a wrong doer, or who has caused the double claims by his own acts or conduct. *Ib.* 472.
  27. *Same; when insurance company cannot maintain as to policies.*—An

## CHANCERY—Continued.

- insurance company, which, at the request of the assured, voluntarily cancelled his policies, and issued them ~~new~~, changing only the names of the beneficiaries, does not stand indifferent between them; the two sets of policies represent different debts and duties, and in the defeat of one of them the company has such an interest as to prevent it from maintaining a bill of interpleader. *Ib.* 472.
28. *Equitable relief against fraudulent judgment or decree.*—A court of equity has undoubted jurisdiction to grant relief against fraud in judicial proceedings; but the fraud must have been practiced in procuring the rendition of the judgment or decree, or in a subsequent alteration thereof, and it must be clearly established by positive proof. *Cromelin v. McCauley et al.* 542.
29. *Same.*—If the judgment or decree assailed was rendered without the service of process, and without the knowledge of the defendant, the rule now seems to be established, that a court of equity will not set it aside unless it is made to appear that the “result will be other or different from that already reached.” *Ib.* 542.
30. *Equitable set-off, on ground of insolvency.*—In the absence of all intervening equities, courts of equity put the same construction on statutes of set-off as do courts of law. Insolvency is recognized as a ground for the allowance of a set-off in equity, when it would not be allowed at law, but it is only the insolvency of the original creditor against whom the claim is asserted; and while the assignee of non-negotiable paper takes it subject to all equities to which it was subject in the hands of the assignor, this means only the equities between the original parties, and does not include equities which may arise between other parties, in the course of its transfer. *Goldthwaite v. National Bank*, 349.

## II. PLEADING AND PRACTICE.

## I. BILL.

1. *Bill; complainant can claim no advantage from indefiniteness in averments of.*—The complainant in a bill can claim no advantage or benefit from the indefiniteness of its allegations, since he is presumed to state his case as fully as the facts will justify. *Underhill, Receiver, v. The Mobile Fire Department Ins. Co.* 45.
2. *Same; what averments do not render multifarious.*—In determining whether or not a bill is multifarious, its object, averments, and prayer, must all be considered; and if it has a single object, to which alone the prayer is directed, it is not rendered multifarious by averments that are impertinent, or which merely seek to negative an anticipated defense. *Ware et al. v. Curry*, 274.
3. *Same; may be framed with double aspect.*—Bills in equity may be framed in a double aspect when each alternative would be the foundation for the same relief; but two inconsistent, repugnant claims to relief, founded on different states of fact, and each, if true, entitling the complainant to relief of a wholly different character, cannot be asserted in the same bill. *Lehman et al. v. Meyer et al.* 396.
4. *Same; but distinct matters must not be conjoined in.*—That a bill should not join distinct or independent matters, or defendants, against whom the complainant may have distinct and independent demands, is a general rule; but when a demurrer should be sustained on either of these grounds, is matter of doubt, and it is impossible, from our decisions, to state a rule which will apply to the varying exigencies of particular cases—this must be determined alone by reference to the averments and prayer of the bill. *Ib.* 396.



## CHANCERY—Continued.

5. *Same*; demurrable when seeking to set aside mortgage as fraudulent, or have it declared a general assignment.—A bill praying that if a mortgage of property by the debtor be not found fraudulent, it may be held to operate as a general assignment, enuring to the benefit of all the creditors of the grantor equally, is demurrable. *Ib.* 396.
6. *Statement of title of plaintiff; sufficiency in.*—It is a principle of universal application in pleading founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the cause he is called upon to defend. *Goldsby v. Goldsby et al.* 560.
7. *Averments in a bill; completeness demanded.*—The averments of a bill in chancery must be so complete that on demurrer or decree *pro confesso* the court can, without evidence, be able to perceive and affirm that complainant is entitled to the relief prayed. *Ib.* 560.
8. *Averments in a bill of review; strictness demanded.*—There are stronger reasons for demanding strictness of averments in a bill of review, than for demanding it in an original bill; and relief can not be granted upon vague and uncertain allegations. *Ib.* 560.
9. *Statement of proceedings in original cause; detail necessary.*—It is necessary to state all of the proceedings in the original cause except the evidence on which the court found the facts on which it proceeded to render a decree. *Ib.* 560.
10. *Bill of interpleader; what it should show.*—A bill of interpleader should state distinctly the nature and character of the conflicting claims which are asserted to the debt, duty, or obligation the plaintiff admits rests upon him, and ability and willingness to discharge which, when he may do so safely, he avows; and the parties who prefer the claims, and have the capacity of enforcing them must be brought before the court. *Conley et al. v. Alabama Gold Life Ins. Co.* 472.
11. *Bill to redeem; necessary averment in.*—A court of equity will not enforce the statutory right of redemption in lands sold under a power in a deed of trust, when the bill fails to aver that the complainant, before it was filed, tendered the amount of the purchaser's bid, with ten per cent. per annum thereon, and demanded redemption. *Stocks v. Young*, 341.

## II. ANSWER.

12. *Answer; how far taken as evidence.*—An answer can only be taken as evidence so far as it is responsive to the allegations and interrogatories in the bill, and when its denials are clear, positive and distinct, and matters of defense, though in form responsive, cannot be taken as evidence. *Craft v. Russell*, 9.
13. *Same; denials in sworn answer, how disproved.*—A sworn answer, responsive to the charges in the bill, and denying them, is evidence for the defendant, which can be overturned only by the opposing testimony of two witnesses, or one witness with corroborating circumstances. *Turner v. Flinn et al.* 529.

## III. PARTIES.

14. *Parties objection for want of; when may be disregarded.*—A demurrer for want of proper parties may be disregarded when the answer shows that all the parties really interested are before the court. *Craft v. Russell*, 9.
15. *Misjoinder of defendants to bill; for whom available.*—One who is

CHANCERY—*Continued.*

improperly joined as a defendant to a bill in equity, may take advantage of the misjoinder, but if he fails to appear and object, a demurrer on that ground, by his co-defendants, will not be sustained. *Ware et al. v. Curry*, 274.

16. *Parties to bill to enjoin erection of mill-dam.*—Where the legal title to lands which have been sold to one who intends erecting a mill and dam upon them remains in the vendor, he having an immediate right of entry thereon, and having made an executory contract of sale of them with full knowledge of the purposes to which the vendee intends to devote them, the vendor is, in such case, a proper, if not a necessary party, to bill of injunction to restrain the erection of the dam. *Ogletree v. McQuaggs et al.* 580.

See ERROR AND APPEAL, AND INJUNCTION.

## CHARGE OF COURT.

1. *Charge ; when abstract.*—A charge based wholly or partly on a state of facts, of which there is no evidence, is abstract, may mislead the jury, and is properly refused. *Tyree v. Lyon, Murphy & Co.* 1.
2. *Charge, general ; when may be given.*—When there is no evidence of fact which is necessary to sustain the plaintiff's right to recover, the court may, on request, give a general charge on the evidence in favor of the defendant. *Ib.* 1.
3. *Charge not error, to refuse misleading.*—It is not error to refuse a charge which may mislead the jury, or which requires explanation. *Bay Shore Railroad Co. v. Harris*, 6.
4. *General charge on the evidence ; when proper.*—A general charge on the evidence is proper, and should be given on request, whenever the court would sustain a demurrer to the evidence, if interposed by the party requesting the charge ; but when the evidence is conflicting, or circumstantial, or when a material fact rests wholly in inference, such a charge cannot be sustained. *Smoot v. Mobile & Montgomery R. R. Co.* 13.
5. *A charge invading province of jury properly refused.*—A charge which assumes the right of the court to direct the jury, that they "must" look to certain facts, as evidence, to influence their verdict, invades the province of the jury, and is properly refused. *Marler v. State*, 55.
6. *Charges must be based on the evidence.*—Charges which are not based on, and assert propositions of law about which no question arises on the evidence in the case, are abstract and misleading, and are properly refused, without reference to whether they are correct or erroneous. *Talladega Insurance Co. v. Peacock*, 253.
7. *Charges ; exception to the refusal of several will not reverse unless all correct.*—A general exception to the refusal to give several charges, will not avail to reverse the case, unless it is shown that each asserts a correct legal principle. *Elliott v. Stocks*, 336.
8. *Charge of court, when no conflict in the evidence.*—Where the evidence is without conflict, it is the duty of the court to refer its credibility to the jury, and, on request, to charge directly on the effect of such evidence. *Scarborough v. Malone et al.* 570.
9. *Erroneous charge, to which neither party objects, should be refused.* Courts must pronounce their own rulings, being guided alone by a sense of judicial duty, and when a written charge is requested by either party, which is erroneous, it should not be given, although the adversary party "withdraws all objection to it." *Cook, Adm'r, v. Cen. R. R. & Banking Co. of Ga. et al.* 533.

See ERROR AND APPEAL, CRIMINAL LAW.

## CHARTER PARTY.

1. *Charter party—stipulations in, not inconsistent.*—When a charter party stipulates that the “party of the second part assumes all liability for all ordinary wear and tear of said steamer,” and by a subsequent clause, “agrees to return, at the expiration of the charter, the steamboat in the same condition as when received, ordinary wear and tear excepted,” there is no inconsistency in the two stipulations, the latter providing for injuries outside of ordinary wear and tear, for which the former provides. *Finnegan v. Frank*, 21.
2. *Same; when charter becomes quasi owner under.*—When the charter has absolute control of the vessel, its voyages, manning and direction, during the continuance of the charter, he becomes the quasi owner of the vessel, is entitled to all the benefits of ownership, and subject to all its liabilities, including those incurred for necessary repairs. *Ib.*

## CODE OF ALABAMA.

1. § 494. Statute imposing license tax on peddlers unconstitutional. *Vines v. State*, 73.
2. § 796. Authority of attorney to bind client. *Norman v. Burns*, 248.
3. §§ 786, 2530. Filing claims against estates of deceased persons. *Floyd v. Clayton*, 265.
4. § 1488. Proceedings adjudging person insane, effect of as evidence. *Marler v. The State*, 55.
5. § 1699. What is not “regular stopping place within meaning of.” *Cook, Adm’r, v. Cen. R. R. and Banking Co. of Ga. et al.* 534.
6. § 2061. Wife’s right to proceeds of sale of homestead. *Bolling v. Jones*, 508.
7. § 2099. Judgment not contract within meaning of. *Lovins et al. v. Humphries*, 437.
8. § 2191. Joint purchasers of land become tenants in common under. *Newbold v. Smart*, 326.
9. §§ 2222–3. Entry of satisfaction of mortgage. *Harris v. Swanson & Bro.* 486.
10. § 2265. Advancements, how valued when brought into hotchpot. *Turner et al. v. Kelly*, 173.
11. § 2349. Meaning of “assets.” *Bishop et al. v. Lalouette’s Heirs*, 197.
12. § 2568. Filing claims against insolvent estates. *Henderson v. Henderson, Adm’r*, 519.
13. § 2706. Husband’s right to rents of wife’s property. *Bolling v. Jones*, 508.
14. § 2773. What is not compliance with. *Lee v. Lee*, 406.
15. § 3058. Policy and purpose of, in excluding evidence against decedent’s estate. *Dismukes & Patrick v. Tolson & Barrett*, 386.
16. § 3058. What not within terms of. *Fort’s Adm’r v. Davis*, 471.
17. § 3242. Does not refer to statute of non-claim. *Yniestra v. Tarleton*, 126.
18. § 3244. Statute of limitations only suspended six months from death. *Lewis v. Ford*, 143.
19. §§ 3467–78. Lien of landlord, how affected by removal of property. *Scaife & Co. v. Stovall*, 237.
20. § 3514. Sale of lands for partition. *Johnson et al. v. Ray*, 603.
21. §§ 3857–3863. Writ of seizure to prevent removal of mortgaged property. *Walker v. Radford*, 446.
22. § 3886. Right of creditors at large to pursue property fraudulently conveyed. *Lehman et al. v. Meyer et al.* 396.
23. § 4213. Definition of words used in. *Sikes v. The State*, 77.



CODE OF ALABAMA—*Continued.*

24. § 4409. Unlawfully killing animal; malice not necessary to offense of. *Thompson v. The State*, 106.
25. § 4533. Removing mortgaged property not larceny. *Scaife & Co. v. Stovall*, 237.
26. § 4634. Proceedings in bastardy not misdemeanor under. *State ex rel. Washington v. Hunter*, 81.

COMPROMISE.

1. *Compromise; when existence of controversy sufficient consideration for.*—The mere existence of a controversy, which has not assumed the form of a pending suit, is not necessarily a sufficient consideration for a contract of compromise; the controversy must have been *bona fide*, and based on reasonable grounds; the promise to pay a mere unfounded claim which one is induced to make by threats of litigation, is without consideration, and as incapable of enforcement as the original claim, and the jury must pass on the good faith of the plaintiff in the assertion of such a claim, and whether there was reasonable ground for it. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
2. *Same; when constitutes no consideration.*—When a claim is absolutely and clearly unsustainable at law or in equity, its compromise constitutes no sufficient legal consideration. *Prince v. Prince*, 565.

CONDITIONAL SALE.

1. *Conditional sale; contract held to constitute.*—A contract under which a chattel is delivered to one who executes four promissory notes, to three of which is attached the condition, that the specific chattel "for the use of which to the maturity thereof the notes are given," is, and shall remain the property of the payee of the notes, to whom it shall be returned in case of default in payment of the notes, and who agrees, in a condition attached to the fourth note, that "on payment of all the notes, the chattel shall become the property of the payor," does not create a chattel mortgage or a bailment, but is a conditional sale. *Sumner v. Woods*, 189.
2. *Same; right of vendor to recover against innocent sub-purchaser.*—A purchaser of personal property from one holding possession under such a conditional sale, acquires only the conditional title of his vendor, and cannot defeat a recovery in detinue brought by the original vendor, even though he shows a *bona fide* purchase for value and without notice. *Ib.* 139.
3. *Same; right of vendor against sub-purchaser.*—A purchaser of personal property from one who holds possession under an incomplete conditional sale cannot defeat a recovery by the original vendor, although he is a *bona fide* purchaser for value and without notice. *Fairbanks, Morse & Co. v. Eureka Co.* 109.

CONSTITUTIONAL LAW.

1. *State cannot prohibit telegraph company from doing business within its limits.*—The Congress of the United States having exercised its power to regulate commerce between the States as to the construction of telegraph lines, no State can directly, or indirectly, by legislative prohibition or otherwise, exclude a foreign telegraph company from doing business within its limits. *American Union Telegraph Co. v. The Western Union Telegraph Co.* 36.
2. *When State may regulate business of telegraph company, within its limits.*—The constitutional power of Congress to regulate commerce does not exclude the exercise of a concurrent power by the States, except so far as Congress has actually exercised the

CONSTITUTIONAL LAW—*Continued.*

power; and no act of Congress is to be interpreted as invading the police powers of the State, unless the intent is clear and obvious. *Ib.* 26.

3. *Federal Constitution; construction placed on by United States Supreme Court binds all courts.*—The construction placed on the provisions of the Federal Constitution by the Supreme Court of the United States is binding on all the judicial tribunals of this country. *Vines v. The State*, 73.
4. *Discrimination by State against products of other States prohibited.* No State, either in the exercise of its taxing power, or of its police power, can discriminate in favor of its own products and manufactures, and against the products and manufactures of other States. *Ib.* 73.
5. *Statute exacting license for peddling, but exempting domestic manufactures, unconstitutional.*—The statute of this State, (Code 1876, § 494, subdivision 8) which imposes a license tax on "peddlers," the amount of the license being regulated by their manner of traveling, and which declares that, "such license shall entitle him to peddle only in the county where it is taken out, but this shall not apply to any articles produced or manufactured in this State," discriminates in favor of the manufactures and products of this State, and against those introduced into it from other States, and is unconstitutional. *Ib.* 73.
6. *Statute; when effect will be given to remainder of, when part held unconstitutional.*—When part of a statute is pronounced unconstitutional, and there are other parts or sections of it, which are not dependent upon, and which are separable from, and capable of full execution without such unconstitutional portion, their validity is not affected. *Ib.* 73.
7. *Same; when whole statute fails, on account of unconstitutional part.* But, if the parts of a statute are so materially connected and dependent as to warrant the belief that the Legislature intended them as a whole, and there is no good reason for believing it was intended; that if a part should be incapable of taking effect the residue should stand, the whole statute must fail. *Ib.* 73.
8. *Same; section 494, sub-div. 8, Code of 1876, entire, and incapable of separation.*—The statute imposing a license tax on peddlers (Code, § 494, sub-div. 8) is, in its purposes and objects, an entirety; and the attempted exemption of domestic manufactures from the tax, cannot be stricken out and the residue of the law preserved without imposing a tax on such manufactures, when the Legislature has not done so, but has expressly relieved them from it. *Ib.* 73.
9. *Unconstitutional statute; statute fixing basis of taxation on law of another State is.*—The statute which provides, that if any other State requires of an insurance company created, or organized by the laws of Alabama, any deposit of security or payment of taxes, fines, penalties, certificates of authority, or license fees, greater than the amount required for a similar purpose from similar companies of other States by the then existing laws of Alabama, then all the companies of such States establishing, or having heretofore established agencies in this State, are required to make the same deposit, for a like purpose, with the Treasurer of this State, and pay to the State Treasury for taxes, fines, penalties, and license fees, an amount equal to the amount of such charges and payments, imposed by the law of such State upon the companies of this State, and the agents thereof, is violative of the constitutional provision, which requires uniformity of taxation, upon the property of individuals and corporations (Art. XI § 6), and is an

CONSTITUTIONAL LAW—*Continued.*

- unwarranted delegation of the legislative power of this State to other States. *Clark & Murrell v. Port of Mobile*, 217.
10. *Payment of license under, no protection.*—Hence the payment by a Mississippi insurance company doing business here of \$1,000 for a State license, which, by the law of Mississippi, is declared to be in full of taxes and licenses, State, county, and municipal, being unauthorized, does not relieve it from the payment of a municipal tax or license. *Ib.* 217.
  11. *Constitutional provisions read and construed, in reference to common law.*—Constitutional provisions which were intended to remedy defects in the common law, must be read and construed in the light of that law; and when words of definite signification at common law are used in such provisions, and there is no intention manifested that they shall be taken in a different sense, they are employed in their known and defined meaning. *Holt v. Agnew et al.* 360
  12. *Same; what the provisions regarding separate estates were intended to accomplish.*—The common law powers of the husband over the wife's property, had been abrogated long before the enactment of the constitutional provisions, (Art. X, § 6) declaring that "all property of every female shall be and remain her separate estate, and shall not be liable to the debts of the husband," &c., which were intended to prevent their restoration, and those provisions do not refer to the voluntary payment by the wife of the husband's debts, which depends for validity on her capacity as owner of the estate, but to the liability which arose as an incident of ownership from the exercise by the husband of his common law powers over the estate. *Ib.* 360.
  13. *Same; create equitable separate estate in married woman.*—Whenever an estate was limited to the sole and separate use of a married woman, before the enactment of the statutes, or these constitutional provisions, she was regarded in a court of equity as a *feme sole*, and could sell or charge the property just as if she were *sui juris*, and the constitutional provisions only create an equitable separate estate, over which she could exercise the same control, the statute did not intervene and attach to it peculiar properties and incidents. *Ib.* 360.

## CONTRACTS.

1. *Executory contract founded on illegal consideration not to be enforced.* No executory contract founded on an illegal consideration can be enforced by suit, nor can any one recover, who, to establish his claim, must trace his right through such a transaction. *Clark v. Colbert et al.* 92.
2. *Executed contract based on composition of felony; law will not interfere between parties to.*—When a contract, the consideration of which is the composition of a felony, is an executed one, the law leaves all who share in such illegal transaction where it finds them, and will not interfere to rescind the contract, and recover the consideration. *Ib.* 92.
3. *Contract; test of right to enforce when impeached as illegal.*—When the plaintiff requires the aid of an illegal transaction to support his contract, which is impeached as illegal, it is incapable of enforcement, but if he have rights originating in a transaction not offensive to law, and a right of recovery independent of an illegal transaction, although he may have participated in it, such transaction can not be employed to defeat his suit. *Ware et al. v. Curry*, 274.
4. *Same; this test of right to enforce applied.*—A vendor of lands who



CONTRACTS—*Continued.*

retained the legal title, but who afterwards voluntarily executed a deed to his vendee, to enable the latter to consummate a contract for the manufacture of iron for the Confederate States, during the war, has a right, springing out of the original contract of sale, to enforce his lien on the lands for the purchase-money. *Ib.* 274.

- 5 *Same*; consent of parties, necessary to validity of, although courts will not interfere with unwise disposition of property.—The owner of property has the right to dispose of it at will, and courts will not assume to control his disposition of it, because they are injudicious, or unwise; but free and voluntary consent is essential to every contract, and this is generally imported by the contract itself. *Holt v. Agnew et al.* 360.

See CORPORATION.

## CONVEYANCES.

1. *Conveyances*; object of the construction of.—The object of all construction of contracts or conveyances is, to ascertain, and, if possible, give effect to the intention of the parties, and if that intention is not clearly or distinctly expressed, if the words of the instrument are general, or, if there is ambiguity of expression admitting of two or more constructions, that construction must be adopted which will make the instrument available in all its parts, and for all its purposes, rather than one which would defeat it in any respect. *Bank of Mobile et al. v. Dunn*, 381.

See PARTNERSHIP; HUSBAND AND WIFE; FRAUDS, AND 'FRAUDULENT CONVEYANCES.

## CORPORATION.

1. *Corporation*; power to borrow money.—A corporation, which is authorized by its charter to transact the business of life, fire and marine insurance, receive money, on deposit, collect promissory notes, and bills of exchange, lend money, and discount or sell such notes, or bills, and to "borrow money, and issue its bonds therefor," is not restricted, by the latter provision, to making loans secured by bonds, but has the incidental and implied power, common to all such corporations, to borrow money, and make negotiable, or non-negotiable paper, and give such securities as may be deemed most advantageous.—*Tulladega Ins. Co. v. Peacock Adm'r*, 253.
2. *Same*; how persons proved to be officers of.—Strangers can not be required to prove the appointment of officers, or agents, of corporations, by written evidence, but it may be inferred from the recognition, or continuous acquiescence, by the corporation in the acts of such officers. *Ib.* 253.
3. *Same*; presumption against, when it fails to prove appointment of officer.—If there is written evidence of such appointment, it is within the peculiar knowledge, and in the exclusive possession of, the corporation, and whatever presumption can be drawn, on account of its absence, must be visited on the corporation, which has voluntarily assumed the attitude of neglecting, or refusing to produce, evidence which was in its possession. *Ib.* 253.
4. *Same*; person may be proved to be officer of, by certain acts.—Evidence that one openly and notoriously transacted the general business of a corporation, had possession and care of its office, in which the business was transacted, the custody of the books and papers, and the funds of the corporation, and had, on more than one occasion, borrowed money, which appeared on the books of the company,

CORPORATIONS—*Continued.*

entered to the credit of the lender, tends to show the relationship of such person to the corporation, the duty and authority pertaining thereto, and might authorize a jury to infer that, in the absence of authority from the corporation, such acts would not have been permitted. *Ib.* 253.

5. *Same; officer of, acting without authority, loss arising from, falls on corporation.*—If corporations, who select their agents, with whom strangers must deal, hold out a particular officer, or suffer him to hold himself out as having particular or general authority, inviting dealings with him, and a loss must ensue thereby, such corporation must bear it, and not those who, so far as was known, or could be seen by them, dealt with the agent in the line, and within the scope of his duty and employment. *Ib.* 263.
6. *Secretary of corporation; authority to borrow money for corporation; how implied.*—Authority to borrow money for a corporation, by its secretary, may be implied from his relation to the company, the nature of his employment, the mode in which he was permitted to conduct its business, and his borrowing on other occasions; and a charge that he must have had express authority to borrow money is erroneous, and properly refused. *Ib.* 253.

## II. FOREIGN CORPORATION.

1. *Foreign corporations; constitutional provisions as to doing business in this State not violative of Federal Constitution.*—The provision of the Constitution (Art. XIV § 4) "that no foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent therein," is a legitimate exercise of the police power of the State, is not in conflict with any act of Congress nor violative of any provision of the Federal constitution. *American Union Tel. Co. v. West. Union Tel. Co.* 26.
2. *Same; when equity will not aid by injunction.*—A court of equity will not interfere by injunction at the suit of a foreign telegraph company to prevent a rival company from obstructing the erection of its poles and wires when the bill does not show that the complainant has any known place of business, or any agent in this State, nor that it has acquired any property or rights of property here. *Ib.* 26.

## III. MUNICIPAL CORPORATIONS.

1. *Municipal corporation; who can not bind.*—Neither the agents, officers, nor city council of a municipal corporation can bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized), is against public policy. *City of Eufaula v. McNab*, 588.
2. *Same; when bound by its agents or officers.*—A municipal corporation is bound only when its agents or officers, (by whom it can alone act, if it acts at all,) keep within the limits of the chartered authority of the corporation. *Ib.* 588.
3. *Same; contracts of; when ultra vires.*—All contracts of municipal corporations, which are not necessary and proper in order to carry into effect the powers expressed in their charters, and which are not germane to the governmental purposes for which such corporations may have been organized, are *ultra vires*. *Ib.* 588.
4. *Same; charter of; in case of doubt, how construed.*—In case of any doubt or ambiguity arising out of terms used in the charters of municipalities and counties, which are invested with civil policies, and political functions, the charters are strictly construed against the existence of such doubted power, and are resolved by construction in favor of the public. *Ib.* 588.

CORPORATIONS—*Continued.*

5. *Charter of the city of Eufaula; section 24 of, construed.*—The charter of the city of Eufaula, entitled "An Act to establish a new charter for the city of Eufaula," approved February 28, 1870, (Session Acts 1869-70, pp. 186, 194), conferred "full power and authority upon the city council to purchase and provide for the payment" of "all such real estate and personal property as may be required for the use, convenience, and improvement of the city," &c. Acting under this power, the city council of Eufaula purchased a tract of land located within the corporate limits of the city, for the benefit of the S. E. Ala. A. & M. Ass'n., and as a place for holding "their annual fairs," and the association was given "the exclusive use of the premises." The consideration paid was \$10,000 of the bonds of the city, running twenty years and bearing interest from date with coupons attached. *Held*, that the action of the city council in making the purchase of the land for the *particular purpose* for which it was bought, was *ultra vires*. *Ib.* 538.
6. *Same; purchase of property in aid of private enterprise, not permitted.*—Under such a power in a charter it is not contemplated, nor permissible, that such property shall be acquired in aid of any private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. *Ib.* 538.
7. *Same; right of to contract, how limited.*—The right of a municipal corporation to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. *Ib.* 538.
8. *Same; when estoppel does not apply to.*—When a municipal corporation makes a contract which is *ultra vires*, the fact that interest has been paid on the debt created by such contract, either by the corporation itself, or by the beneficiary of the contract, with the concurrence of the corporation, does not effect the case and can not work an estoppel. *Ib.* 538.
9. *Action for violation of municipal ordinance of city of Selma; how tried on appeal.*—On appeal to the City Court of Selma, from a judgment of conviction rendered by the Mayor of the city, for a violation of a municipal ordinance, the case is, under the provisions of the city charter, to be tried *de novo*, as in cases of appeals from the judgments of justices of the peace in civil cases, and a motion to quash the proceedings before the mayor, for any defect except a want of jurisdiction, apparent on their face, can not be made for the first time in the City Court. *City of Selma v. Stewart*, 338.
10. *Proper practice in such cases.*—The proper practice in such cases, to preserve the constitutional right of the defendant to demand the nature and cause of the accusation against him, is to require the plaintiff to file a statement of the case, and all questions as to its legal sufficiency, or as to the jurisdiction, can be raised by demurrer. *Ib.* 338.
11. *Statement; error to disregard.*—When such a statement is filed, before the trial, it is error to disregard it, and quash the proceedings for defects not raised in the municipal court. *Ib.* 338.
12. *Costs; municipal corporations not liable for in prosecutions.*—Municipal corporations are not, in any event, liable for costs incurred in prosecutions for the punishment of offenders against their ordinances. *Ib.* 338.
13. *Corporations; when not authorized to levy taxes.*—A municipality which has power "to levy taxes on real and personal property, auction sales, and sales of merchandise, and capital employed in



CORPORATIONS—*Continued.*

business therein, and street tax on all male inhabitants of the age of twenty-one years," is prohibited both by the absence of legislative authority, and by the enumeration of certain powers, of which this is not one, from levying a tax on the gross receipts of warehouses. *City of Selma v. Selma Press & Warehouse Co.*

COSTS.

1. *Re-taxing costs; to what objections motions for, are confined.*—Motions to re-tax costs are confined to objections to the taxation made by the clerk or other ministerial officer of the court, and do not open inquiry into the merits of the judgment, which the clerk is bound to pursue in taxing the costs. *Tecumseh Iron Co. v. Mangum*, 246.
2. *Costs; appellant taxed with, when defect in his bill prevents decree in his favor.*—When a defect in his bill prevents the rendition of a final decree in favor of the appellant, he will be charged with the costs of appeal. *Cruikshank v. Luttrell*, 313.

COURTS.

1. *Courts; power to adjourn after opening of term.*—When the term is regularly opened, at the place appointed by law, courts have the inherent power to adjourn to any other day of the term; and when the court is authorized to continue "until disposed of," it may adjourn to any day before the commencement of the next term. *Williams v. The State*, 183.

CREDITOR. See DEBTOR AND CREDITOR.

CRIMINAL LAW.

ANIMALS, UNLAWFULLY KILLING.

1. *Trespass to pursue animals with dogs and kill them.*—One who pursues with dogs, and kills animals belonging to another, when found injuring his crops, even though they may have broken into his field, is guilty of trespass.
2. *"Unlawful," to commit trespass.*—One who commits a trespass in killing an animal, kills it "unlawfully."
3. *Malice not an ingredient of offense of unlawfully or wantonly killing animals.*—Malice is not an ingredient of the offense of unlawfully or wantonly killing an animal as denounced by the statute (Code, § 4409), and if the defendant killed the animal unlawfully, he is properly convicted of such offense.

BIGAMY.

1. *Bigamy, or "polygamy;" who are guilty of.*—Any person having a former husband or wife, who marries again in this State, unless by a decree of a court of competent jurisdiction, such person has been divorced from the former husband or wife, and permitted to marry again, or, the former husband or wife has been continuously absent for five years immediately preceding the second marriage, and such person did not know the former husband or wife to be living, is guilty of the crime of bigamy, or polygamy, under the law of this State. *Jones v. State*, 84.
2. *Rumor or belief, that former husband or wife dead; no defense on indictment for polygamy.*—On the trial of such an offense, evidence that at the time of the second marriage, the former husband had been absent for more than a year; that defendant had heard her former husband was dead, and it was currently reported and believed that he was dead, is no defense, and is properly excluded. *Ib.* 84.

CRIMINAL LAW—*Continued.*

3. *Polygamy, what constitutes the criminal intent in.*—In such a case, the only criminal intent, which is of the essence of the offense, is the intent to marry a second time, not knowing the husband, who had been absent only one year, to be dead. *Ib.* 84.

## BURGLARY.

1. *Burglary; when may be committed by person in charge of house.* An employee left in charge of a house, who enters a closed room and steals therefrom, when, by virtue of his employment, he had no right to go there, is guilty of burglary. *Hild v. State*, 87.

## CHARGE OF COURT.

1. *Charge may be refused, though stating law correctly, if not based on evidence.*—Charges should be based on the tendencies of the testimony, and if not correct in reference to the evidence in the case, although they may assert legal propositions correct in themselves, a refusal to give them, as requested, will not authorize a reversal. *Street v. State*, 87.
2. *Same; misleading charge properly refused.*—A charge "that a pistol is not concealed unless it is hid from the ordinary observation of those who are in a position to see it, if it were not concealed," is confused, and when taken in connection with the evidence in the cause—that the pistol was only seen when the defendant pulled off his coat—tended to mislead the jury, and was properly refused. *Ib.* 87.

See, also, HOMICIDE.

## CARRYING CONCEALED WEAPONS.

1. *Concealed weapons; what constitutes offense of.*—To constitute the offense of carrying a concealed weapon, it must be worn, or carried, so that persons near enough to see it, if it was not concealed, can not see it. *Street v. State*, 87.

## EVIDENCE.

1. *Severance; defendants competent witnesses after.*—Where two are jointly indicted and there is a severance, either of the defendants is a competent witness for or against the other. *Marler v. State*, 55.
2. *Insanity; not proved against defendant by special proceedings adjudging co-defendant insane.*—The record of the proceedings in the separate trial under the statute (Code, § 1488), in which one of two defendants who are jointly indicted, is adjudged insane, are not evidence against his co-defendant, of the fact of such insanity, on a trial under the indictment. *Ib.* 55.
3. *Witness becoming insane; his testimony on former trial admissible.* When a witness was examined on the preliminary investigation before a committing magistrate, and becomes insane before a trial of the accused, under indictment for the same offense, the testimony of such witness, as given before the magistrate, is admissible in evidence on the second trial. *Ib.* 55.
4. *Same; may be proved by secondary evidence.*—When the testimony of such witness was not reduced to writing on the preliminary trial before the committing magistrate, secondary evidence of what he testified to, is admissible. *Ib.* 55.
5. *Same; only necessary to state substance of testimony.*—The precise words of such witness need not be repeated on the second trial, but only the substance of his testimony. *Ib.* 55.
6. *Accomplice; what necessary to authorize conviction for felony on evidence of.*—To authorize a conviction for felony on the testimony

CRIMINAL LAW—*Continued.*

- of an accomplice, his testimony need not be corroborated in every material particular, but it must be corroborated by evidence, tending to connect the defendant with the commission of the offense, and it is not sufficient if only so confirmed, as to convince the jury of its truth. *Ib.* 55.
7. *Conspiracy to commit crime; how proved.*—Conspiracies to commit crime may be proved by circumstantial, as well as by direct evidence; and no positive agreement for such purpose need be shown. *Ib.* 55.
  8. *Same; may be proven by evidence of accomplice; when.*—Such a conspiracy may be proven by the testimony of an accomplice, if it be sufficiently corroborated, as to his statement connecting the defendant with the commission of the offense. *Ib.* 55.
  9. *Motive; evidence admissible to show.*—When defendant had begun suit against his wife for divorce, and his complicity in the killing arose from a desire to get rid of deceased, an important witness for the wife, as an obstacle to his success, statements made by him to a witness, that “he was tired of his wife, and intended to get a divorce from her,” and requesting permission to marry the daughter of the witness, are competent to show motive, and were properly admitted in evidence. *Ib.* 55.
  10. *Same; proof of in such case.*—In such a case the jury could not consider the merits of the divorce suit, but only the fact of its pendency and the motive of its prosecution. *Ib.* 55.
  11. *Threats against deceased made by accomplice; when admissible.* Where an accomplice testified that he killed the deceased at the instigation of the defendant, evidence of threats made by such accomplice against the deceased, because the latter was talking about his sister, tend to show that the slayer acted from personal malice without reference to the defendant, and is admissible. *Ib.* 55.
  12. *Dying declarations made in answer to questions; admissible.*—On the trial of one charged with murder, a declaration made by deceased as to the cause and circumstances of his death, while under conviction of impending dissolution, although part of it was in reply to questions asked him, is admissible. *Ingram v. The State*, 67.
  13. *Cross-examination, conduct of, largely in the discretion of the court.* There is no uniform rule governing the cross-examination of witnesses, but it rests largely in the discretion of the court, greater liberty being permissible when the witness shows partisanship, than when he evinces impartiality; and it must be a strong case to justify a reversal for too great latitude allowed in such examination. *Ib.* 67.
  14. *Character; what to be considered in estimating.*—The shadings, as well as the brighter hues, are to be considered in making up the estimate of character and reputation; and, when a witness had testified that he knew the character of the accused for peace and quietude, and that it was good, it is not error to allow him to be asked, on cross-examination, if he had not been informed that the defendant had “killed a man in the State of Georgia,” and his answer was admissible in evidence. *Ib.* 67.

HOMICIDE—SELF-DEFENSE.

1. *Self-defense: doctrine as to, stated.*—A charge which asserts that the necessity of self-defense, which justifies the taking of human life must be present, imperious, and impending, or so appear to the defendant, is free from error. *Ingram v. The State*, 67.
2. *Same; what necessary to make out justifiable homicide in self-defense.* Charges which declare that, “to make out a case of justifiable



CRIMINAL LAW—*Continued.*

homicide committed in self-defense," the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time, as to create a reasonable apprehension of danger to his life, or grievous bodily harm, and that there was no other reasonable mode of escape from such impending evil, are proper. *Ib.* 67.

3. *Same: charge which ignores duty of escaping from difficulty, in establishing, erroneous.*—On a trial for murder, when the accused relies on self-defense to justify the killing, charges which assert the right of the defendant to kill the deceased, if it reasonably appear to him that the deceased intended to take his life, or inflict on him great bodily harm, but which ignore the fact, or principle, that, to establish this defense, there must have been no other safe mode of escape open to defendant, are properly refused. *Ib.* 67.

## INDICTMENT.

1. *Burglary; what sufficient statement of value in indictment for.*—In an indictment for burglary, which avers that defendant, "with intent to steal, broke into and entered the store of H., in which goods, &c., things of value, were kept for use, &c.," sufficiently shows that things of value were kept therein, at the time of the breaking and entry, and is good. *Williams v. The State, 183.*
2. *Ownership; how to be averred in indictment.*—When it is necessary in an indictment, to aver the ownership of property, it is sufficient to lay it in any one or more of several partners or owners. *Ib.* 183.
3. *Indictment; when defective because averments relate to time when preferred.*—When an indictment alleges that "defendant is the owner or keeper of a saloon in which intoxicating liquors are kept for sale, having a billiard table connected therewith, on which the public can play, and knowingly permitted a minor to play thereon; such averments relate to the time when the indictment was found, and it is defective in not charging these attendant facts and circumstances, which make the act of defendant an indictable offense, to have existed at the time the alleged offense was committed. *Sikes v. The State, 77.*

## MINORS, PLAYING ON BILLIARD TABLES.

1. *"Billiard table," defined.*—The word, "billiard table," as used in the statute (Code, § 4213), prohibiting saloon keepers from permitting minors to play thereon, includes all tables, with or without pockets, on which the game of billiards could be, and was played, at the time of its enactment. *Sikes v. The State, 77.*
2. *"Pool tables;" prohibition includes playing on.*—The statutory prohibition against permitting minors to play on billiard tables includes the tables on which the game of "pool" is now usually played, but on which the game of billiards was played at the time the statute was passed. *Ib.* 77.
3. *"Game;" what prohibited, for minors, on billiard table.*—The game played thereon need not be that which is technically called billiards, but it must be a kindred game, which is played with balls and cues, or some substitute for them. *Ib.* 77.
4. *"Playing thereon;" meaning of, in the statute.*—Mere sport or pastime on the table, or even playing with the balls, is not within the statutory prohibition, but there must be a game played, or begun to be played, with the balls and cues, or some substitute therefor, to constitute the offense denounced by the statute. *Ib.* 77.
5. *"Public use of the table;" what necessary to constitute the offense.* It is not necessary that the table should be kept for pay, but to

## CRIMINAL LAW—Continued.

make out the offense, it must appear that the table is such an one as the public are invited and permitted to play on, and a charge which withdraws this question from the jury, is erroneous. *Ib.* 77.

### LARCENY.

1. *Larceny; removing or selling property on which another has a claim, is not.*—Although the statute (Code, § 4533), declares that a tenant, or other person, who, with an intent to hinder, delay or defraud, removes or sells, property on which another has a valid claim, may be punished as if he had stolen it, yet it does not convert the sale, or removal, into larceny, nor does it prevent an innocent purchaser from acquiring a good title. *Scaife & Co. v. Stovall*, 237.

### PLEADING AND PRACTICE.

1. *Plea in abatement, as to drawing grand jury; what must negative.* A plea in abatement, which negatives the presence of the clerk of the Circuit Court at the drawing of the grand jury, but does not negative the presence of the clerk of the City Court, is bad. *Williams v. The State*, 183.
2. *Same; sustained where defendant indicted as Mincher, his name being Minshen.*—The names *Mincher* and *Minshen* are not *idem sonans*, and a plea in abatement to an indictment charging *Wm. Mincher* with an offense is properly sustained on proof that the defendant's name is *Minshen*. *Adams v. The State*, 89.
3. *Severance; worked by the insanity of one defendant and the separate arraignment of the other.*—When two persons are jointly indicted, and one of them has been adjudged insane on a separate trial of that issue, and ordered to be confined in the insane hospital and his trial postponed until he becomes sane, and the other is subsequently arraigned and tried alone, there is a severance of the cases of the two defendants. *Marler v. The State*, 55.

## DAMAGES.

1. *Prospective damages may be recovered in action on the case for personal injuries.*—In an action on the case for personal injuries, the recovery is not limited to the actual injury, and the suffering sustained and undergone up to the time of the trial, but the plaintiff may recover prospective damages for the disabling effect of the injury. *Bay Shore Railroad Co. v. Harris*, 6.
2. *Damages against sheriff for failing to return execution; what may be recovered and how.*—The failure of a sheriff to return an execution according to its mandate, is a breach of his official bond for which the plaintiff may, in a common law action, recover damages; but in the absence of averment and proof of actual injury, the damages are nominal, and the statutory damages of twenty per cent. on the amount of the judgment are not recoverable in such an action, but only in a summary proceeding under the statute. *Marcum v. Burgess*, 556.
3. *Damages in trover; how to be assessed.*—In assessing damages in trover, the jury may fix the value of the property converted as proven at any time between the conversion and the trial, but they are not bound to adopt the highest value proved. *Street v. Nelson et al.* 504.

See NEGLIGENCE, RAILROADS.

## DEBTOR AND CREDITOR.

1. *Creditor receiving debtor's check is holder for valuable consideration.* When a creditor takes his debtor's check on a bank in payment of

DEBTOR AND CREDITOR—*Continued.*

his debt, he is a holder for a valuable consideration. *Mobile & Montgomery Railway Co. v. Felrath*, 189.

2. *Depreciated currency; promise by debtor to make good deficiency caused by payment of, valid.*—A promise by a debtor, who pays depreciated currency to his creditor, to make good the deficiency, is founded on a valuable consideration, and may be enforced, although the creditor may have surrendered the evidence of the debt. *McElderry v. Jones*, 203.
3. *Debtor; promise to pay more than due to creditor, not to be enforced.* But a promise by a debtor, who tenders money to his creditor, such as the latter is bound to receive, and which is the full measure of the debtor's liability, to pay more in another currency, of greater value in the transaction of business, is without consideration, and can not be enforced. *Ib.* 203.

## DEED.

1. *Deed; instrument held not to be.*—An instrument which purports to be made in consideration that Mrs. W. will support Mrs. B. during the life of the latter, will pay her debts, and render certain other specific services for her, and bury her decently at her death, which is signed by both, and declares that on the performance of these conditions by Mrs. W. she shall have and be entitled at and after the death of Mrs. B., to all the property owned by Mrs. W., except certain furniture, "none of which is sold or contracted away by these articles of agreement," but which contains no words of grant or conveyance, is not a deed. *Breuton, Adm'r, v. Watson*, 121.
2. *Deed; words of granting or alienation necessary in.*—Formal and technical words are not necessary in a deed to lands, and when an intent is manifested that the estate shall pass, the words will, if possible, be construed so as to take effect, but there can be no valid or operative conveyance of lands without some words of grant or alienation. *Ib.* 121.

See HOMESTEAD; HUSBAND AND WIFE.

## DEFINITIONS.

1. "*Assets;*" word, as used in the Code (§ 2349), includes land.—The word "assets," as used in the statute (Code, § 2349), authorizing the grant of letters of administration on the estates of non-residents, who die, leaving "assets," in the county where such assets are left, includes land. *Bishop et al v. Lalouette's Heirs*, 197.
2. "*Sounding in damages merely;*" meaning of these words in the statutes regulating set-offs.—Claims for which the law furnishes no standard of measurement, even when the facts are ascertained, "sound in damages merely," but those, the value of which may be measured by a pecuniary standard, when the facts on which they are based are established, do not "sound in damages merely," and may be the subject of a set-off. *Collins v. Greene*, 211.

See CRIMINAL LAW—MINORS, PLAYING ON BILLIARD TABLES.

## DISCONTINUANCE.

1. *Discontinuance; when discontinuance as to one defendant operates as discontinuance to all, and when it does not.*—When several defendants are sued and served with process, a discontinuance as to one of them, without a sufficient legal excuse therefor, operates as a discontinuance of the whole action; but in such a case, when one of the defendants interposes a plea of infancy, or other similar personal defense, the plaintiff may admit its truth and discon-



DISCONTINUANCE—*Continued.*

tinue the case as to such defendant, without prejudice to the case against his co-defendant. *Reynolds et al. v. Simpkins*, 378.

2. *Same*; may be entered without prejudice when evidence shows disability.—When, in such case, the evidence introduced on the trial of a cause, shows that there is no legal cause of action against one of several defendants, by reason of such personal defense of infancy, even though it is not formally presented by plea, the plaintiff may, on motion, discontinue as to such defendant, without prejudicing his case against the other defendants.—*Ib.* 378.

DOMICIL.

1. *Domicil of child determined by domicil of father.*—The domicil of the father during his life, is also the domicil of his infant child, and the latter does not lose his right to claim property as exempt to him on the death of his father, although, at that time, he is in another State attending school. *Kelly, Ex'r, v. Garrett, Ex'r*, 304.

EJECTMENT.

1. *Ejectment; personal representative may recover in.*—When the legal title to land was in the intestate at the time of her death, the personal representative may recover in ejectment against one who holds possession of them under an agreement which entitles her, on performance of its conditions, to all the property owned by such intestate at the time of her death.—*Brewton, Adm'r, v. Watson*, 121.
2. *Ejectment against several; practice as to judgment entry and assessment of damages.*—In an action of ejectment against several defendants, it is the better practice to have but one judgment entry, with the assessment of damages in severalty; but if the record shows a separate judgment against each defendant, the defect is a clerical error, which can be corrected in the appellate court. *Bishop et al. v. Lalouette's Heirs*, 197.
3. *Ejectment by mortgagee; payment of mortgage debt no defense to.* Payment of the mortgage debt, in whole or in part, after forfeiture, is no defense to an action of ejectment by the mortgagee.—*Jackson et al. Adm'rs, v. Scott et al.* 99.
4. *Same; when payment of mortgage debt no defense to.*—Under a mortgage of chattels, payment of the mortgage debt, before action brought, will defeat a recovery; but, in reference to mortgages of real estate, this court has adopted a different rule, and holds the mortgagee entitled to recover at law, as against the mortgagor and those claiming under him, whenever the mortgage is silent as to his right to take possession, or when the period has expired during which the right of possession is reserved to the mortgagor, and payment of the debt will not defeat a recovery in such action; though "it seems to be settled, that as against all persons, except the mortgagee and those claiming in his right, the legal title is in the mortgagor until foreclosure." *Slaughter v. Doe*, 494.

ERROR AND APPEAL.

1. *Supreme Court; power to review case submitted to decision of court without jury.*—When an issue of fact is submitted to the decision of the court in a civil action without the intervention of a jury, this court can only review the sufficiency of the facts to support the judgment when there has been a special finding which has been reduced to writing and entered on the minutes of the court. *McCarthy v. Zeigler*, 43.
2. *Special finding; what is not.*—The sole question of fact being the delivery, *vel non*, of a deed by the deceased grantor in his life-

ERROR AND APPEAL—*Continued.*

- time, the bill of exceptions set out all the evidence adduced, and added: "Upon this evidence, the cause was submitted to the court as a question of law, whether the said grantors held the title to said property under said conveyance, or whether the property belonged to the estate of the deceased grantor, and to the rulings upon said finding of facts the plaintiff excepted," while the judgment entry, after reciting the submission of the cause to the court without a jury, added, "and the court, upon due consideration of the same, is of opinion that the plaintiff is not entitled to recover." *Held*, that the record did not show a special finding on the facts, and this court could not revise the judgment. *Ib.* 43.
3. *Appeal ; what is such final decree as will support.*—A decree which settles all the equities between the parties is final, and will support an appeal, although it may be necessary to ascertain the respective shares of the parties in a fund in controversy. *Hastie & Silver v. Aiken et al.* 313.
  4. *Same ; waiver of right of revision by.*—When the record shows that, after the overruling of a motion to dissolve the injunction on the denials of the answer, a decretal order or reference of the matters of account was made with the consent of the parties, such consent operates as a waiver of the right to review, by appeal, the order refusing to dissolve the injunction. *Hinson v. Brooks*, 491.
  5. *Error not noticed unless assigned.*—Error apparent on the record, but not assigned, is not noticed unless it be a want of jurisdiction over the subject-matter in the primary court, which compels a reversal, and except under special circumstances, without remanding the case. *Lehman et al. v. Meyer et al.* 396.
  6. *Same ; when presumed to be waived.*—All errors, except a want of jurisdiction, may be, and are presumed to be, waived, if they are not assigned, and in civil cases, the court may, in its discretion, refuse to notice errors assigned, but not insisted on in argument. *Ib.* 396.
  7. *Parties ; decree on merits ; when not affirmed for want of.*—When the complainant is entitled to relief, but the Chancellor dismissed the bill on the merits, the decree will not be affirmed for want of proper parties, no objection on that ground having been made in the court below, but the case will be reversed and an opportunity given him to amend. *Cruikshank v. Luttrell*, 318.
  8. *Appellant taxed with costs when defect in his bill prevents decree in his favor.*—When a defect in his bill prevents the rendition of a final decree in favor of the appellant, he will be charged with the costs of appeal. *Ib.* 318.
  9. *Error is not presumed, but must be shown.*—When the bill of exceptions does not set out all the evidence, this court will presume that the proof justified the rulings of the court below, unless the presumption is repelled by the record. *Houston et al. v. Hilton et al.* 374.
  10. *Assignment of error on decree from which appeal is made ; joinder in error.*—A joinder in error in a chancery cause, and a submission for decision on the merits, without any motion to strike out assignments of error based on a decree from which an appeal was barred, or to dismiss the appeal on that ground, operate as a waiver of the objection, and the assignment will not be disregarded by the court. So held in this case, the joinder being in these words: "There is no error in the record, of which the appellant can now complain." *Bolling v. Jones*, 508.
  11. *Revision of probate decree, on question of fact.*—On appeal from a probate decree on a disputed question of fact, "it requires a very

**ERROR AND APPEAL—Continued.**

- clear conviction of error to justify a reversal." *Henderson v. Henderson's Adm'r*, 519.
12. *Revision of Chancellor's decree on facts.*—"Giving the legal testimony in this record its proper weight, and treating the Chancellor's finding as *prima facie* correct, the court cannot clearly see that his judgment is wrong;" and therefore affirms his decree, under the rule laid down in *Rather v. Young* (54 Ala. 94), and other cases cited. *Fort's Adm'r v. Davis*, 481.
  13. *Chancellor's decree prima facie correct; error must be shown.*—When, in a creditor's bill, the evidence is conflicting as to fraud in the conveyances which are sought to be set aside on that ground, the decree of the Chancellor declaring such conveyances fraudulent, is presumed to be correct, until the party assailing it repels this presumption; and it will not be disturbed when, as in this case, this court is not satisfied that his decree was erroneous. *Lehman et al. v. Meyer et al.* 396.

**ESTATES OF DECEASED PERSONS.**

1. *Non-claim, statute of; exceptions in statute of limitations as to fraud, do not refer to.*—The provisions of § 3242 of the Code, that "an action may be brought at any time within one year from the discovery, by the aggrieved party, of the facts constituting the fraud," do not refer to the statute of non-claim. *Yniestra v. Tarleton et al.* 126.
2. *Same; claims originated by fraud of deceased, barred by.*—A claim against the estate of a deceased person, originating in, or based on his fraudulent concealment of the cause of action, is barred by the statute of non-claim, unless it is presented to his personal representative or filed in the office of the judge of probate, of the proper county, within eighteen months after the grant of letters testamentary or of administration. *Ib.* 126.
3. *Same; demurrer to bill on ground of, when properly sustained.*—When a bill filed to enforce a claim against the estate of a deceased person, which it is alleged arose from a cause of action fraudulently concealed by him, shows on its face that such claim was not presented to the personal representative of his estate, nor filed in the office of the judge of probate, of the proper county, within eighteen months after the grant of letters testamentary or of administration, a demurrer on the ground that such claim is barred by the statute of non-claim, is properly sustained. *Ib.* 126.
4. *Statute of non-claim; how presentation made to prevent bar of.* Claims against the estates of deceased persons, may, to prevent the bar of the statute of non-claim, be presented in three different modes, viz: 1. By presenting the claim, or an accurate description of it, to the personal representative, in person. 2. By filing a statement of the claim, within eighteen months after the grant of letters, or after the accrual of the claim, in the office of the judge of probate of the county in which the letters were granted. 3. By filing the claim itself, within that period, in the office of the judge of probate. *Floyd v. Clayton, Exr.* 265.
5. *Claims against the estates of deceased persons must be docketed.*—If the claim, or a statement of it, is filed in the office of the judge of probate, the statute, (Code, §§ 876, 2599), requires such claim or statement to be docketed, and if demanded a statement must be given by the judge showing the time of presentation. *Ib.* 265.
6. *Claim, statement of; filing of, is act of creditor.*—If, instead of filing the claim itself, the creditor files a statement of it, this is his act and not that of the judge of probate, or of any ministerial officer, charged with the duty of making the statement. *Ib.* 265.



ESTATES OF DECEASED PERSONS—*Continued.*

7. *Statement of claim; what it must contain.*—The statement need not observe the certainty of description essential in pleading, but it must of itself inform the personal representative, on inspecting it, of the nature, character, and amount of the liability it imposes, and must distinguish it with reasonable certainty from all similar claims. *Ib.* 265.
8. *Statement of claim in such case held insufficient.*—A statement written in the 'claim book,' in the office of the judge of probate, by him, for a creditor holding a promissory note, that "F. claims as security, July 20, 1865, \$545," does not inform the personal representative that the claim is a promissory note made by the deceased, nor its amount, nor its date, nor to whom payable, or when due, is too vague and indefinite, and is not such a presentation of the claim, as will operate to prevent the bar of the statute of non-claim. *Ib.* 265.
9. *Non-claim, bar of statute of; prevented by filing the claim, although not docketed.*—When the creditor files the claim itself, its subsequent docketing is the duty of the probate judge, and his omission or neglect of that duty, cannot be invoked to the prejudice of the creditor, and the presentation is sufficient to prevent the bar of the statute of non-claim. *Ib.* 265.
10. *Claim or statement must remain on file during the whole period of eighteen months.*—The claim, or a proper statement of it, must remain on file during the whole of the eighteen months, and if the creditor, after filing the claim itself, should, without leaving such a statement in the office of the probate judge, withdraw it, and not restore it within eighteen months, this would operate as an abandonment of the presentation. *Ib.* 265.
11. *Suit operates as a presentment.*—The commencement of a suit within the statutory period, and its continued prosecution, operates as a presentation of the claim on which it is founded. *Ib.* 265.
12. *Void and voidable letters of administration, distinction as to acts done under authority of.*—Whatever is done under the authority of letters of administration, which are void, *ab initio*, is without validity, but whatever is rightfully done, before revocation, under letters which are merely voidable, is as valid as if the grant itself were rightful. *Ib.* 265.
13. *Presentment of claims to administrator when administration voidable, is sufficient.*—A grant of letters of administration, as in cases of intestacy, when the deceased left a will, which had not been admitted to probate, is voidable, and not void, and creditors may safely deal with such administrator and make presentment to him, of claims against the estate, and presentment to him, is operative against the executor after the grant of letters testamentary and saves the bar of the statute of non-claim. *Ib.* 265.
14. *Repeated presentments not required.*—The statute does not require repeated, or renewed presentments, as often as there may be changes in the administration. *Ib.* 265.
15. *Hotchpot; value of advancement, brought into, how estimated.*—On the distribution of a decedent's estate, when advancements are brought into hotchpot, the statute (Code, § 2265) requires that they shall be estimated at the value, if any, specified in the conveyance, and in other cases, at their value when made; the shares in partition or distribution are, as to the corpus of the property, to be valued as of the time when they become the actual property of the heir or distributee. *Turner et al v. Kelly*, 173.
16. *Alien leaving assets in Alabama; what court administers.*—Letters of administration on the estate of a citizen, and resident of France, who died there, intestate, leaving assets in Alabama, consisting

ESTATES OF DECEASED PERSONS—*Continued.*

- of land only, may be granted by the probate court of the county in which the land is situated. *Bishop et al v. Lalouette's Heirs*, 197.
17. *Sale of lands of deceased persons ; duty of Probate Court as to.*—The Court of Probate must examine the report of sale, and also examine witnesses with reference to it, and if the sale was not fairly conducted, or the amount bid for the land was greatly less than its real value, the sale should be vacated, or, if the sureties for the purchase-money are insufficient the sale should not be confirmed until sufficient security is given, but if the sale is vacated, the court must order a resale of the lands, to be advertised, and conducted in all respects, as was the first sale. *Cruikshank v. Luttrell*, 318.
  18. *Same ; no valid sale unless court prescribes place.*—When lands of an estate are decreed to be sold by the Probate Court, the court must determine the place of the sale, and if no place is fixed by the court the personal representative cannot select it, and no valid sale can be had. *Ib.* 318.
  19. *Same ; when confirmed and deed made.*—If the Probate Court is satisfied that the sale was fairly conducted, that the land brought a sum not greatly less than its real value, and that the purchase-money is sufficiently secured, it must confirm the sale ; but the purchaser cannot obtain a deed until the sale is confirmed, the purchase-money paid, its payment reported to the court, and the personal representative ordered to execute the conveyance. *Ib.* 318.
  20. *Same ; sales by personal representative of, under decree, are judicial.* Sales of the lands of estates by the personal representative, under the decrees of the Probate Court, which fixes the place and terms of sale, and which are subject to confirmation by it, are essentially and strictly *judicial*. The court is the vendor, and the executor or administrator merely the agent or officer through whom the sale is made. *Ib.* 318.
  21. *Same ; in whom is title until conveyance.*—The legal title to lands sold under the orders of the Probate Court, remains in the heir or devisee, until a conveyance is executed to the purchaser, under the decree of the Probate Court, and they may until that time recover the possession from the purchaser by ejectment. *Ib.* 318.
  22. *Same ; Probate Court has no jurisdiction to confirm void sales of.*—The Probate Court, as to the sales of the lands of estates, is of limited, statutory jurisdiction, and has no authority to confirm void sales made by a personal representative. *Ib.* 318.
  23. *Non-claim, statute of: mere knowledge of claim does not prevent operation of.*—There must be an actual presentation of the claim, or some act of the creditor which is equivalent thereto, to prevent the operation of the statute of non-claim ; mere knowledge of the existence of the claim on the part of the executor, or administrator, no matter how full, will not have that effect. *Allen, Adm'r, v. Elliott, Adm'r*, 432.
  24. *Same: by whom claim must be presented to avoid operation of.*—The claim must be presented by some one having an interest in it, and a legal right to enforce its payment, which must be evinced by some word or act which indicates an intention to look to the estate of the deceased debtor for its payment. *Ib.* 432.
  25. *Presentation: evidence as to which one of two estates the claim is presented against admissible.*—Where both the makers of the note were dead, and the same person was the administrator of the estates of each of them, he should be permitted to testify in a suit against him as administrator of one of the estates that no presen-

ESTATES OF DECEASED PERSONS—*Continued.*

tation was made to him of the claim as against that estate, and the endorsements of presentation on the note are relevant evidence on that issue. *Ib.* 432.

## ESTOPPEL.

1. *Estoppel; not created against widow by payment on debt of her intestate by her.*—Where a testator devised his lands to his widow, and she, without taking out letters testamentary or of administration on his estate, recognized a debt as valid and subsisting against his estate, and made partial payments on it; *held*, that this did not estop her or her personal representative from pleading the statute of limitations in bar of an action by the creditor. *Lewis v. Ford*, 143.
2. *Same; tenants may not deny landlord's title.*—Tenants, and their privies in blood or estate, are estopped from denying the title of the landlord under whom they hold, or of one succeeding to his rights, so long as they continue the possession originally derived from him; and when sued for the possession of the demised premises by the landlord, or one succeeding to his rights, are precluded, as well as after the termination, as during the continuation of the lease, from disputing the landlord's title, or from setting up an outstanding title in a stranger. *Bishop et al. v. Lalouette's Heirs*, 197.
2. *Same; same.*—When an administrator recovered, in ejectment, against persons who submitted to his claim as administrator, and subsequently paid him rent, such persons can not, in an action of ejectment for the same premises, brought against them by the heirs of the decedent, dispute the title of the heirs, or set up the fact that the lands have escheated to the State, so long as they continue in the possession derived from the administrator. *Ib.* 197.
3. *Same; vendee of lands holding under executory contract estopped from denying vendor's title.*—The vendee of lands, who holds possession under an executory contract of sale, and all who derive possession from him, are estopped from denying the title of the vendor. *Potts v. Coleman*, 221.

## EVIDENCE.

1. *Books; statements from, not evidence.*—Statements of a witness, derived, not from personal knowledge of the matters testified about, but from an inspection of the books of an insurance company, are not legal evidence. *Mobile Life Ins. Co. v. Egger*, 134.
2. *Testimony of husband and wife for or against each other.*—Husband and wife are competent witnesses for or against each other, when not required to disclose confidential communications. *Miller, Adm'r, v. King*, 575.
3. *Evidence of contract between landlord and tenant, admissible in action against sub-tenant.*—When, in an action by the landlord to recover rent, the defendant pleads that he obtained possession from the lessee, who was authorized in writing to lease the lands and receive the rents, and the landlord replies that his lessee has broken his agreement, and that the written contract had been rescinded, the contract, as well as evidence of the breach of it, or of its rescission, is admissible. *Moberly v. Peek*, 345.
4. *Shop books; when original entries in are evidence.*—Original entries made in the usual course of business by a party having personal knowledge of the facts, in his own shop books, if such entries are made contemporaneously with the facts to which they relate, and



## EVIDENCE—Continued.

- are corroborated by the testimony of the party if living, or by proof of his handwriting if dead, insane, or beyond the jurisdiction of the court, are generally admissible in his favor. *Dismukes & Patrick v. Tolson & Barrett*, 386.
5. *Transactions with deceased persons; purpose and scope of the statute excluding evidence as to, by interested witnesses.*—The purpose of the statute, which declares, "that neither party shall testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit," (Code, § 3058), is to exclude the living from testifying against the dead, who cannot be heard in explanation and contradiction, and it applies to all cases involving a direct, immediate conflict of interest between the witness, and the estate of a decedent, where the effect of the evidence is to diminish the rights of the deceased, or of those claiming under him. *Ib.* 386.
  6. *Shop books: original entries in, not evidence for party making them against estate of decedent.*—When the vendor of goods dies and his personal representative brings an action against the purchaser for the price, the purchaser cannot read in evidence original entries made in his own shop books, in the usual course of trade, showing payment to the vendor; such entries are made contemporaneously, are mere written declarations of the party; are parts of the *res gestæ*, and are properly excluded, as transaction by, or with, a deceased person whose estate is interested in the result of the suit. *Ib.* 386.
  7. *Proof of transactions with deceased person, whose estate is interested in suit; competency of parties as witnesses.*—Under a bill for specific performance, filed by the purchaser against the heirs and personal representative of the deceased vendor, alleging that the notes for the purchase-money were given by the vendor to a son and daughter who had not received equal advancements with his other children, and were paid to them by the complainant after the death of the vendor; such payments are not *transactions with the decedent* whose estate is interested in the result of the suit (Code, § 3058), and may be proved by the distributees to whom the money was paid, although they are parties to the suit; but a party to the suit, being an heir and distributee, can not testify to statements by the deceased vendor tending to disprove the alleged gift and transfer of the notes, thereby increasing the assets of the estate in which he is interested. *Port's Adm'r v. Davis*, 481.
  8. *Agent; may testify that he made full and honest disclosure of authority.*—The defendant, after he has stated all that passed between him and the plaintiff, may testify that he made a full and honest disclosure to him as to the extent of his authority to act as agent in a transaction on which the suit is founded; such a statement is equivalent to saying that he communicated all the facts within his knowledge to the plaintiff. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
  9. *Res inter alios acta; rule applied.*—The amount of money received by an insurance company for a paid-up policy, which another insurance company had bought from the assured, partly for money and partly for other insurance to be taken out in the latter company, is *res inter alios acta*, and furnishes no criterion of the measure of the liability of the latter company, in a suit by the assured, to recover on a failure to issue him a policy, or to pay him the agreed value of the paid-up policy. *Mobile Life Insurance Co. v. Egger*, 134.
  10. *Opinion: statement by witness that he had no interest in subject matter of suit, is not.*—A witness can only testify as to facts which come within his personal knowledge; but a statement that he had no

EVIDENCE—*Continued.*

- interest in the subject matter of the suit, and derived no benefit from it, is not objectionable as matter of opinion. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
11. *Collective facts; witness may testify to.*—A witness may state collective facts, as that “— had no right to convey the property;” “— did not own it,” etc.; and the adverse party may, on cross-examination, bring out the facts on which the witness rests his conclusions. *Elliott v. Stock & Bro.* 290.
  12. *Hearsay; statement by witness not.*—A statement by a witness that “the money was loaned by his agent in 1860, and renewed annually until 1863,” is not hearsay, although he subsequently stated that “meantime he was in the State of Texas,” for he may have had personal knowledge of the loan and its renewals. *Talladega Ins. Co. v. Peacock, Adm’r*, 253.
  13. *Burden of proof; when on plaintiff, in suit against corporation.* When, in an action against a corporation, on a note for money borrowed by its secretary, and which was executed by him, and signed with the corporate name, “by him, as secretary,” the defendant interposes a sworn plea of *non est factum*, the burden of proof is on the plaintiff to show that such person was the secretary of the corporation, and was authorized to borrow money, before the note is admissible in evidence. *Ib.* 253.
  14. *Evidence; when to be excluded.*—It is not often necessary, and it is but seldom that the court can, prescribe the order in which a party may introduce his evidence, but when it is all produced, and it is wholly insufficient to support the cause of action, or the grounds of defense, or if any part of it is then irrelevant, because unconnected with other evidence, the court should, on motion, exclude all the evidence, or such unconnected part of it. *Talladega Ins. Co. v. Peacock, Adm’r*, 253.
  15. *General objection to evidence, part of which is admissible; properly refused.*—Objections to evidence, and a part of which is admissible, may, for that reason, be properly overruled. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
  16. *Oral evidence, of contents of writing; when not admissible.*—When a writing, if produced, would not be evidence of the fact to which it relates, parol or oral evidence of such fact will be received. *Mayrant & Co. v. Marston, Brown & Co.* 456.
  17. *Same; received when writing beyond jurisdiction of court.*—A witness may testify as to the contents of a paper, which is shown to be beyond the jurisdiction of the court, and which the party relying upon it cannot produce. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
  18. *Written contract; prior negotiations not contained in, presumed abandoned.*—When parties have reduced their contract to writing, all prior negotiations not carried into writing, are presumed to be abandoned. *Mayrant & Co. v. Marston, Brown & Co.* 458.
  19. *Power of attorney; contents proved, when original beyond jurisdiction.*—Secondary evidence of the contents of a power of attorney, is admissible, when the original is shown to be beyond the jurisdiction of the court. *Elliott v. Stock & Bro.* 290.
  20. *Record; correction of.*—Parol evidence is not admissible to correct, or explain clerical errors in judicial proceedings, but if an inspection of the entire record clearly discloses their nature and extent, the record corrects itself, and the court will construe it as corrected. *King v. Martin*, 177.
  21. *Same; record in this case corrects itself.*—Where a will is set out in a record, and is described as dated Nov. 18, 1873, and subsequently in the judgment of the court, it is stated that it was executed in 1875, the record also showing that the testator died prior

## EVIDENCE—Continued.

- to 1875, it is a mere clerical error which the record itself corrects. *Ib.* 177.
22. *Record ; proof of.*—A record is proved by the mere production and inspection of the original, or of an exemplified or authenticated copy. *Ib.* 177.
23. *Judgment ; parol evidence received in aid of.*—The record of a judgment which was recovered in an action against a corporation sued by the name of the Mobile and Montgomery Railroad Company, and appearance by attorney and pleadings filed in the name of the Mobile and Montgomery Railway Company, unaided by parol evidence, might be conclusive as to the identity of the corporations, but there is no error in receiving parol evidence in aid of it. *Ib.* 177.
24. *Declaration of party ; not admissible in his favor.*—Declarations of a party, which promote his interests, and are not part of the *res gestæ*, or of facts lying within the knowledge of his adversary, and which, if untrue, it is reasonable to presume he would contradict, are not admissible in favor of the declarant, although made to his adversary. *Street v. Kelly*, 478.
25. *Secondary evidence of written contract ; not admissible until absence of writing accounted for.*—When contracts, on which depend the rights of parties to the suit, are in writing, parol evidence of their contents is not admissible, unless the absence of the written contract, the higher and better evidence, is accounted for properly ; and where such a contract was in court, in possession of the plaintiff's attorney, but had been excluded as evidence because not proven by either of the subscribing witnesses, and no excuse was given for failing to introduce them, it was error to allow parol evidence of its contents. *Ib.* 478.
26. *Cross-examination ; witness not examined as to writing without its production.*—A witness cannot, on cross-examination, be questioned about matters reduced to writing, and subscribed by him, until the writing is produced and shown, or read to him. *Ib.* 478.
27. *Objection to evidence admissible under one of several counts or demises.* In ejectment, where two or more demises are laid in the declaration, evidence which is applicable to one only cannot be excluded from the jury, on motion, because inapplicable to the others : its operation and effect should be explained and limited by a request for appropriate instructions. *Slaughter v. Doe ex dem. Swift, Murphy & Co.* 494.
28. *Personal property ; when ownership of, proved by oral testimony.* The ownership of personal property may be proved by oral testimony, unless the question of the transfer of the title arises between the parties to the conveyance, and is the direct issue in the cause, then the highest and best evidence must be produced, or its absence accounted for. *Street v. Nelson et al.* 504.
29. *Secondary evidence of written contract ; admissible when contract incidental in suit.*—When the sole purpose of secondary evidence of the contents of a written contract is to explain the contract on which the suit is based, and show the inducement to its execution, the rule requiring the highest and best evidence does not apply, but when a written contract defines and determines the relative rights of the parties between themselves, and is a main issue in the cause, it is error not to require its production as the best evidence of its terms. *Ib.* 504.
30. *Opinion ; what statement by witness not regarded as.*—The opinion of a witness, or a conclusion drawn by him from facts, is not admissible evidence, but a statement by a witness, that he regarded a person "as the general agent" of the defendant corporation, does not fall within this rule, when connected with, and accom-



EVIDENCE—*Continued.*

panied by statements as to the means and sources of the knowledge of the witness. *Talladega Ins. Co. v. Peacock, Adm'r, 233.*

## EXECUTION.

1. *Execution sale ; growing crops pass to purchaser at.*—Growing crops are part of the realty and pass with the title to the land to a purchaser at execution sale. *Thweat, Adm'r, v. Stamps, 96.*

See DAMAGES, 2.

## EXECUTORS AND ADMINISTRATORS.

1. *Administrator; when may sue individually on contracts made with him in his representative character.*—If an administrator has accounted for the proceeds of a contract made with him in his representative character, or if he has been charged with them on his settlement, or if a claim grows out of his unauthorized disposition of the assets of the estate, by which he rendered himself liable therefor, and from which he has not been discharged, his right to sue individually, on such contracts, or claims, continues as long as he is administrator, and afterwards, and his personal representative may sue on them. *Collins v. Greene, 211.*
2. *Same; when can not sue individually on such contracts.*—If, however, the administrator has settled the estate, and has been discharged, without having been charged with such proceeds, then he can maintain no action on such contracts, or claims, and the right to sue passes to the succeeding administrator. *Ib. 211.*
3. *Personal representatives take no interest in the lands of testator or intestate.*—Personal representatives, although they have statutory powers and duties as to the lands of the decedent, take no interest in them, but *eo instanti* his death they descend to the heir, or pass to the devisee, subject only to the exercise of the statutory powers of the executor or administrator. *Cruikshank v. Luttrell, 318.*
4. *Powers of personal representative; how exercised.*—The powers of the personal representative over the lands of the testator, or intestate, are entirely statutory, and must be exercised and executed as the statute directs, and an exercise of them in any other mode can not convey any rights, or relieve the executor or administrator from liability. *Ib. 318.*
5. *Same; what powers personal representative has over lands of deceased.* The personal representative may rent the lands of the estate, or may sell them under the decree of the Probate Court for the payment of the debts of the testator, or intestate, when the personalty is insufficient for that purpose, or to effect an equal distribution among the heirs or distributees. *Ib. 318.*
6. *Personal representative; duties of as to sales of land.*—Whether the sale is to pay debts, or for distribution, the personal representative must secure the purchase-money by taking two sufficient sureties, and report the sale within sixty days to the Probate Court. *Ib. 318.*
7. *Sale of lands of decedent; not changed by personal representative.* When a sale of the lands of an estate is made by a personal representative, under the orders of the Probate Court, he can not change or vary the terms or conditions of sale, or enter into any new or other contract with the purchaser. *Ib. 318.*
8. *Same; executor or administrator, and purchaser, can not rescind sale made under the order of the Probate Court.*—When an executor sells lands of his testator, under the order of the Probate Court, the heirs or devisees acquire rights thereby, and an agreement made

EXECUTORS AND ADMINISTRATORS—*Continued.*

- afterwards between the executor and the purchaser, by which it is intended to rescind the sale, and absolve the purchaser from the payment of the purchase-money, is inconsistent with the nature of the sale, with the statutes regulating it, with the principle which prevents the representative from binding the estate by his contracts, and is void. *Ib.* 318.
9. *Same; can not be resold by the representative without an order of court.* In such a case, after an attempted rescission of the sale, the power to resell resides in the court, and the personal representative can not resell, except by its order, and an attempted resale by him is void; the original sale remains valid, and a succeeding administrator or executor may enforce payment of the purchase-money. *Ib.* 318.
  10. *Personal representative may take lands in payment of debts.*—Executors and administrators may, being responsible for any loss caused thereby, take lands in payment of, or in compromise of, debts due the estates they represent, but the rights of heirs or devisees immediately attach, and can only be divested by their consent, or by a judicial proceeding to which they are parties; and while adult heirs or devisees may elect to keep the land, such an election can only be made for infants by the Chancery Court. *Ib.* 318.
  11. *Foreign administrators; can not receive payment of debts until letters recorded in Alabama.*—Foreign administrators, until they have caused their letters, duly authenticated, to be recorded where they seek to reduce to possession a chose in action, have no authority to receive payment of it, and payment to them before their letters are recorded is no protection against the claims of creditors or of a domestic administrator. *Ferguson et al. v. Morris*, 389.
  12. *Executors or administrators could receive Confederate currency in payment of debts.*—Executors or administrators and other trustees, who were clothed with the legal title to the claims due the estates which they represented, might receive Confederate treasury notes in payment of them, and in the absence of fraud or collusion the debts were extinguished. *Ib.* 389.

EXEMPTIONS.

1. *Homestead exemption; facts in bar of right to.*—A man who has not occupied premises, and who fails to interpose his claim to have them exempt until after the sheriff has sold, is not allowed the benefit of the exemption statutes. *Waugh v. Montgomery*, 573.
2. *Exemptions; creditor is person in adverse interest in proceeding to set apart for minor heirs.*—When commissioners, appointed at the instance of the personal representative, by the Probate Court, to set apart property as exempt for the benefit of the minor children of a decedent, make their report, a creditor is a "person in adverse interest," and may file written exceptions to the allowance of the claim. *Kelly, Ex'r, v. Garrett, Ex'r*, 304.
3. *Report of commissioners to set apart homestead; when error to confirm.*—When on the day that a petition was filed by an executor to set apart property as exempt for the benefit of the minor heirs of a decedent, commissioners were appointed for the purpose, who reported ten days thereafter, an order of the Probate Court confirming their report on the same day, is unauthorized and should be vacated on motion. *Ib.* 304.
4. *Same; jurisdiction of the Probate Court to try exceptions to.*—As the statutes require the issue formed on exceptions to such a report to be certified to the Circuit Court for trial, and expressly prohibit the Probate Court from exercising jurisdiction to try the

EXEMPTIONS—*Continued.*

- right of homestead, its proceedings on the trial of such exceptions, are *coram non judice*, and absolutely void. *Ib.* 304.
5. *Exemptions against creditors; by what law determined.*—The right to a homestead, or other exemptions, as well as their value and extent, are determined, as against creditors, by the law which was of force when the debts were contracted, but the proceedings for their allotment may be regulated by a subsequent law. *Ib.* 304.
  6. *Homestead exemption to decedent's widow; by what law determined, and in what lands claimed.*—The right to a homestead exemption, in favor of the widow of a deceased debtor, must be determined by the law which was of force when the debts were contracted against which it is asserted, and can only be claimed in lands in which the decedent had such an interest as might be sold for the payment of debts by his administrator. *Bolling v. Jones*, 508.
  7. *Claim of homestead exemption by mortgagor's widow, when mortgage is set aside by creditors on ground of fraud.*—A mortgage executed by the husband to the wife, to secure a simulated indebtedness, being held fraudulent and set aside under a bill filed by creditors, the wife may claim a homestead exemption in the lands, or, in lieu thereof, \$500 of the proceeds of sale under the decree (Rev. Code, § 2061); but, the estate of the deceased mortgagor having been declared insolvent before the bill was filed, and the lands sold by the administrator, under a probate decree, for the payment of debts, the widow becoming the purchaser at the price of \$500, which was claimed and allowed to her as the value of her homestead interest—her homestead claim was thereby extinguished; and the lands being again sold under the decree of the court, she is not entitled to \$500 of the proceeds of sale, although the former sale was set aside under the prayer of the creditor's bill. *STONE, J., dissenting.*) *Ib.* 508.
  8. *Conveyance of homestead, by husband to wife, not fraudulent.*—The conveyance by a husband to his wife of a homestead, even though voluntary, is not fraudulent. *Lehman, Durr & Co. v. Bryan*, 558.
  9. *Abandonment of homestead; what constitutes.*—Temporary absence is not necessarily an abandonment. The *animus revertendi* of the owner is a material element in the determination of the question. *Ib.* 558.
  10. *Animus revertendi; how arrived at.*—The intention to return may be shown by circumstances and conditions attending the removal, including the declarations of the party accompanying the act. *Ib.* 558.
  11. *Declarations made after rights of creditors have intervened.*—Declarations made advantageous to the declarant after the rights of creditors have intervened, are entitled to but little, if any, weight. *Ib.* 558.
  12. *Animus revertendi; what constitutes.*—Where a husband left his home with his family, intending to return if his wife's health improved,—*Held*: the *animus revertendi* was not a present intention existing at the time of the removal, and the removal forfeits exemptions. *Ib.* 558.
  13. *The right of homestead does not prevail against valid liens.*—The right of homestead does not prevail against valid liens, and can not be asserted by one of two tenants in common against the other's equitable lien, for an excess of purchase-money paid by him, over and above his share. *Newbold v. Smart*, 326.

## FIXTURES.

1. *Fixtures annexed to realty; action lies for refusal to allow severance.*  
When fixtures are annexed to the freehold, a demand should be



**FIXTURES—Continued.**

made for the right of removal, and on refusal, an action lies for preventing the owner from exercising the right to sever. *Thweat Adm'r v. Stamps*, 96.

2. "Rails and brick," when personally and when realty.—"Rails and brick" not connected with the freehold, are personal property, and do not become fixtures until they are actually or constructively annexed to the realty. *Ib.* 96.

**FRAUDS AND FRAUDULENT CONVEYANCES.**

1. *Proof of fraud.*—Courts will not strive to force conclusions of fraud; and if the facts and circumstances in evidence are fairly susceptible of an honest intent, that construction will be placed upon them. *Cromelin v. McCauley*, 542.
2. *Fraudulent foreclosure of mortgage.*—A decree foreclosing a mortgage will not be set aside, at the instance of a creditor of the mortgagor, because of a fraudulent intent on the part of the mortgagor (who was the defendant in the decree), unless the mortgagee and complainant had knowledge of such fraudulent intent, participated in it collusively, or had knowledge of facts sufficient to charge him with notice. *Ib.* 542.
3. *Validity of mortgage assumed for fraud.*—A mortgage will not be held fraudulent at the instance of creditors, merely because it was given to secure an antecedent debt, and the mortgagee knew that the mortgagor was financially embarrassed. *Ib.* 542.
4. *Conveyance impeached as fraudulent; what evidence will not uphold.* When an insolvent debtor conveys land to his sons about the time they reach their majority, the deed can not be upheld on the evidence of the sons, who are without visible means, and who testify that the land was paid for in labor and services rendered by them, without stating the kind of labor, or its value by the month or year. *Pyron et al. v. Lemon*, 458.
5. *Validity of fraudulent mortgage as between parties; sale of equity of redemption.*—A mortgage, though it may be fraudulent as against existing creditors, is valid and binding as between the parties, their heirs, personal representatives, and privies in estate; and the equity of redemption remaining in the mortgagor is liable to sale by his administrator for the payment of debts, and subject to a claim of homestead exemption by his widow. *Bolling v. Jones*, 508.

See CHANCERY, AND HUSBAND AND WIFE.

**GUARDIAN AND WARD.**

1. *Character of guardian; abuse of trust.*—In the grant of letters of guardianship for an infant, the interest of the ward, the safety of his funds, and the character of the guardian for integrity and sound judgment, are the considerations that should influence the court; and it is an abuse of the trust to appoint a person of known insolvency, who is instigated to apply for letters by the officers of an insurance company, they becoming sureties on his bond, and he lending the infant's funds to the company without security. *Lee v. Lee*, 406.
2. *Guardian; when is abuse of trust to resign and settle accounts.*—When a guardian resigns and makes a settlement of his accounts, the expense of the proceeding falls on the ward; and the statutes do not contemplate the appointment of a person who has agreed with one of his sureties, in advance of his appointment, to resign and settle his accounts at the expiration of one year, in order that the surety may be discharged; this is an abuse of trust.

GUARDIAN AND WARD—*Continued.*

3. *Same ; when re-appointment of should be refused.*—When a guardian settles his accounts, and resigns, at the same time applying for a re-appointment as his own successor with different sureties on his bond, this should excite the vigilance of the court, and the appointment should be refused without a sufficient explanation of the unusual circumstances. *Ib.* 406.
4. *Same ; liability of sureties.*—The guardian having loaned the trust funds of his wards to an insurance company, whose directors had become sureties on his official bond, on his agreement to lend the funds to their company, no security being given or required for the loan, it is immaterial whether this was a stipulation of the original agreement ; nor can the directors, in avoidance of their personal liability as sureties, shelter themselves behind a formal compliance with the requisitions of the statute (Code, § 2773), because two persons of known insolvency signed their names as sureties for the loan. *Ib.* 406.
5. *Same : may not make settlement with guardian ad litem.*—A guardian cannot, during the minority of his ward, file his accounts for final settlement, make a settlement with a guardian *ad litem*, and resign ; such settlement being unauthorized, it neither discharges the sureties on his bond, nor binds the ward. *Ib.* 406.
6. *Same ; same ; effect of such settlement.*—On such settlement and resignation, the guardian being immediately re-appointed, and giving bond with the same sureties (except one, who sought thereby to be discharged), the exhibition and tender to him of the money which he had loaned the insurance company, and which he had promised in advance not to accept, does not amount to a payment in fact, nor affect the rights and liabilities of the parties. *Ib.* 406.
7. *Doctrine of retainer ; bond, election, ward.*—In such a case the doctrine of retainer and presumed extinguishment, growing out of the dual relation of debtor and creditor existing in the same person does not apply ; the sureties on the first bond are not discharged, but the ward may, at his election, proceed against the sureties on either bond. *Ib.* 406.
8. *Sureties ; bill, amendment.*—The bill being filed against the sureties on both bonds, and alleging that all participated in the proceedings connected with the resignation and re-appointment of the guardian, for the purpose of procuring the release and discharge of the single surety on the first bond who did not sign the second bond, and at the same time enabling the insurance company to retain the money, it was held on the former appeal (*Lee v. Lee*, 55 Ala. 590), that the bill was not multifarious. But the evidence failing to sustain the allegations of the bill as to the participation of the released surety in the covinous combination and conspiracy established against the others, the complainants are entitled to no relief against him ; but being entitled to substantial relief, they should be allowed an opportunity to amend their bill. *Ib.* 406.
9. *Guardian ; breach of official duty by, to lend ward's money without security.*—When a guardian lends out the money of his ward without security, he is guilty of a breach of official duty, and the borrower, if cognizant of this breach of duty, becomes a trustee of the money *in invitum* ; and the ward may, at his election, hold them accountable as joint and several trustees. *Ib.* 406.
10. *Partial payment ; collateral.*—In such a case a partial payment made by the borrower, operates as a partial payment made by the guardian ; and a mortgage, or other collateral security, given by the borrower to the guardian and enforced by the ward, operates only as a partial payment, and does not amount to a ratification of the guardian's unlawful act. *Ib.* 406.

## HEIRS.

1. *Heir ; title to lands of ancestor dying intestate.*—*Eo instanti*, the death of the ancestor, the title to lands of which he was then possessed, vests in the heir, giving him the right to maintain an action for their recovery and for the rents ; but the personal representative of the deceased may intercept the descent, claim the possession of the lands, rent them out and obtain orders to sell them for the payment of debts and for the purposes of administration. *Turner et al. v. Kelly, 173.*
2. *Heir ; rights of, under civil law of Louisiana to ancestor's property.* Under the civil law of Louisiana, the rights of the heir to the rights and obligations of his ancestor are transmitted by succession, and *eo instanti* his death, the heir acquires the right to take possession of all the ancestor's estate, and the right of possession, which the deceased had, continues in the heir as if there had been no interruption, independent of the fact of possession. *King v. Martin, 177.*
3. *Same ; interest in estate governed by domicil of intestate.*—The domicil of the intestate being in Louisiana at the time of his death, and the property in controversy situated there, the nature and quantum of the interest of an heir is governed by the law of Louisiana, and the principle is not changed, although the courts of Alabama afterwards acquired jurisdiction to appoint an administrator, because the intestate died in this State, and assets were subsequently brought into Alabama. *Ib. 177.*
4. *Same ; when may maintain assumpsit to recover distributive share.* Where M., a resident of Louisiana, died in Alabama leaving a will, by which he gave all his property to J. and A., (who were also heirs,) and pending proceedings in the courts of Louisiana by M., another heir, to annul the will, the executor therein, brought the property to Alabama and delivered it to J. and A., the Supreme Court of Louisiana subsequently declaring the will void,—*Held* : 1. That, under the laws of Louisiana, the interests of A. and J. and M. were in the nature of a tenancy in common ; 2. That M. could recover her share of the estate of the intestate by an action of assumpsit, for money had and received, against J. and A. respectively. *Ib. 177.*
5. *Heirship ; proved by decree of Probate Court on settlement of estate.* In an action of ejectment, by the heirs of a decedent, against the lessees of the administrator, the record of the proceedings of the Probate Court showing the appointment of the administrator, and decrees against him, as such, in favor of the plaintiffs in ejectment, as heirs of such decedent—is admissible to prove the fact of such administration, and the heirship of the plaintiffs. (STONE, J., *dissenting*, held that the lessees of an administrator are estopped from denying the intestate's title to the demised premises, and, on the determination of the administration, can not dispute the title of the heir ; but the record of the proceedings in the Probate Court, on the settlement of the administration, does not prove the fact of the heirship of the plaintiffs, in an action of ejectment to recover the land from the lessees, and is, as to them, illegal evidence.) *Bishop et al. v. Lalouette's Heirs, 197.*

HOMESTEAD. See EXEMPTIONS.

HOMICIDE. See CRIMINAL LAW.

## HUSBAND AND WIFE.

1. *Equitable separate estate ; what words create in deed.*—A conveyance to "the sole and proper use, benefit and behoof" of a married woman, whether these words are used in the usual granting clause,



## HUSBAND AND WIFE--Continued.

- or in the *habendum*, create in her an equitable separate estate. *Smith v. McGuire*, 34.
2. *Married woman; effect of official acknowledgment of deed by.*—The official certificate of the acknowledgment by a married woman of a conveyance passing her real estate, is a part of the conveyance and necessary to its validity; and, though it is not conclusive, the evidence impeaching it must be clear and convincing. *Ib.* 34.
  3. *Same; what evidence not sufficient to impeach acknowledgment of deed made by.*—When the testimony relied on to impeach the certificate is based on the fraud and duress of the husband in procuring the wife's signature, and the evidence of such fraud and duress proceeds from the husband and wife only, their credibility is affected by their interest; and when (as in this case, the testimony relates exclusively to occurrences between themselves, in the privacy of domestic life, and is uncorroborated by any other evidence, while the testimony is full and positive that the wife was informed of the contents of the conveyance, and that she voluntarily executed and acknowledged it, the evidence is not sufficient to overcome the certificate. *Ib.* 34.
  4. *Funeral expenses of wife must be borne by the husband.*—The law casts on the surviving husband the duty and legal obligation of burying his deceased wife, and of paying for the proper funeral expenses. *Lott v. Graves*, 40.
  5. *Equitable separate estate of wife, not charged except by her.*—No one except the wife, by her own contract, can create a charge on her equitable separate estate, and no one can after her death incur any debt for which such estate can be made liable. *Ib.* 40.
  6. *Fiduciary debt; husband's liability to account as trustee, is.*—The liability of the husband as trustee of the wife's equitable separate estate, under an ante-nuptial contract to account to the personal representative of the deceased wife for trust moneys received and unaccounted for at the death of the wife, is a fiduciary debt and is not affected by his discharge in bankruptcy. *Donovan v. Haynie, Adm'r*, 51.
  7. *Separate estate of wife; when husband must join in suit for.*—The provision of the statute allowing the wife to sue alone (Code, § 2892), when the suit relates to her separate estate, refers only to the estate created by the laws of Alabama, and not to those created by the laws of any other State; and where the wife has an interest in the suit under the laws of such State, the husband is a proper party plaintiff. *King v. Martin*, 177.
  8. *Statutory separate estate; power of wife over, when husband is trustee, and when he has been removed.*—The wife cannot charge or alienate her statutory estate to pay her husband's debt, nor mortgage it to pay any debt or demand whatever. She may sell and convey it, but the husband must join in the conveyance, which must be witnessed or acknowledged. If, however, the husband who, under the law, manages her property as trustee, becomes unfit to control it, a court of equity will remove him, and the wife then becomes invested with all the power over the property which she would have as a *feme sole*. *Holt v. Agnew*, 360.
  9. *Wife; may be relieved of the disabilities of coverture as to separate estate, and may then pay husband's debts.*—The wife may, on application to the Chancellor, be relieved, under the statutes, from the disabilities of coverture, as to her separate property, and her power to buy and sell then becomes unlimited, and there is no reason for excluding the power to make mortgages, or transfers of any kind, to secure the debts of her husband. *Ib.* 360.
  10. *Wife; transactions with, when she suffers loss and gains no benefit; how regarded in equity.*—Transactions with a wife, looking to the

HUSBAND AND WIFE—*Continued.*

- relief of a diseased husband, who is harassed in mind, and in dread of criminal prosecution, from which she suffers detriment, without deriving corresponding benefit, in which she parts with property, without receiving an adequate valuable consideration, the parties dealing with her having knowledge of her distressed condition, will be investigated vigilantly by courts of equity, and if there be any trace of undue influence from any source, or advantage taken of her condition, it will undo them. *Ib.* 360.
11. *Same; same.*—Fraud need not be shown, in such case, but if the wife acted hastily, without time and opportunity for deliberation, in the absence of disinterested advice, and without opportunity to obtain it, or, if she was acting under the influence of the fear of punishment of her husband, or of extreme terror, or, of apprehension of his impending death, and her motive was his relief, a court of equity must intervene and restore her to the condition in which she was, when induced into the transaction. *Ib.* 360.
  12. *Husband's debts; when payment of by wife will not be disturbed.* When it is shown that there was no haste, no want of deliberation on the part of the wife, no threat of prosecuting her husband criminally, but that she had the advice of friends (although she knew her husband's creditors were acting with the advice of counsel), and that her avowed purpose in transferring a policy of insurance on the life of her husband in payment of his debts, was to save the good name of her husband and children, the law cannot condemn the fair and intelligent exercise of such a motive, and the transfer will not be disturbed. *Ib.* 360.
  13. *The statutory separate estate of wife; deed of trust to.*—The statutory separate estate of a wife is not subject to encumbrance to secure her husband's debt. When her estate is conveyed in trust for this purpose, neither the trustee of the beneficiary acquires any right cognizable in a court of law or equity. *Prince v. Prince*, 565.
  14. *Same; absolute conveyance of.*—The true construction of the constitution and statutes prohibits and invalidates even a properly certified and absolute deed, when made to secure payment of the husband's debt. *Ib.* 565.
  15. *Same; limitations of prohibitory principle as to conveying.*—The conveyance is binding where the wife takes an interest in lands for the payment of which a mortgage is given, and binding on the husband surviving his wife, and passes his life estate when the conveyance contains a warranty; and when the conveyance is made or contract entered into in the exercise of implied or express powers conferred by statute; and when the husband, having a legal title, and the wife a secret equity merely, a conveyance is made to a *bona fide* purchaser without notice. *Ib.* 565.
  16. *Same; all persons dealing with charged with notice of its ownership and status.*—All parties dealing with lands, the legal title to which is in the wife, are charged with a knowledge of their status and ownership. *Ib.* 565.
  17. *When husband contracts on his own responsibility for improvements on his wife's estate.*—When the husband, on his own responsibility, contracts for the improvement of his wife's estate, mere silence or failure on her part to dissent from the contract, cannot be construed as an intention to bind her estate in payment. *Copeland v. Kelsoe & Ramsey*, 594.
  18. *Rents of wife's lands; husband's liability for.*—The husband has the right to receive the rents of the wife's estate, free from liability to account (Code, § 2706); and his receipt and use of them do not create a liability or debt, such as will support a conveyance to the wife, as against his creditors. *Bolling v. Jones*, 508.

HUSBAND AND WIFE—*Continued.*

19. *Wife's interest in lands purchased by her husband with money belonging to her statutory separate estate.*—When a husband invests the money of his wife, belonging to her statutory separate estate, in lands, and takes the title in his own name, an equity at once arises in the wife's favor either to charge the lands with the payment of the money or to claim the lands themselves by way of a resulting trust. *Nettles v. Nettles*, 599.
20. *Same ; equity, how created.*—The equity is not a direct or express trust which can be created only by instruments in writing, duly signed by the grantor, or declared, but is one that results by implication or construction of law. *Ib.* 599.
21. *Relation of husband and wife to the subject of the trust.*—The husband is invested with the legal title with every apparent indicium of ownership, while the wife enjoys a mere equity, which she may assert or not at her election. *Ib.* 599.
22. *Constructive trust ; may be barred by statutes of limitations.*—These implied or constructive trusts have been uniformly construed to come within the operation of the statutes of limitations. *Ib.* 599.
23. *Same ; what a bar to assertion of, by wife.*—Such secret trusts are discountenanced by the courts where there has been unreasonable laches in their operation, and gross laches in assertion will debar relief entirely. If a beneficiary sleeps upon his rights with a full knowledge of a clear breach of trust, he will be left to "bear the fruits of his own negligence or infirmity of purpose." *Ib.* 599.

## INFANTS.

1. *Infants ; chancery rule as to service of process on, does not apply to Probate Courts.*—While the rule in the Courts of Chancery requires personal service on infants, or some one of them, depending on the facts of the case, the rule is otherwise in Courts of Probate, and a final settlement, made without personal service on the infant distributees, who were represented by a guardian *ad litem*, is valid. *Trawick's Heirs v. Trawick's Adm'r*, 271.
2. *Same ; cannot be guilty of contributory negligence.*—An infant under six years of age is not of sufficient discretion to be guilty of contributory negligence. *Bay Shore R. R. Co. v. Harris*, 6.

## INJUNCTIONS.

1. *Injunction ; when awarded as ancillary to a bill for specific performance.*—Whenever a *prima facie* case for specific performance is shown, and the injury apprehended from breaches of the contract is of a nature not capable of adequate compensation in damages at law, an injunction may be awarded as ancillary to the bill. *Chambers et al. v. The Alabama Iron Co.* 353.
2. *Same ; motion to dissolve sustained for want of equity in bill, although submitted in vacation.*—A motion to dissolve an injunction should be sustained if the bill is without equity, although such motion is submitted in vacation. *Ib.* 353.
3. *Same ; what considered on motion to dissolve.*—On motion to dissolve an injunction after answer filed, for want of equity in the bill, the facts stated, and not the manner in which they are stated, nor the form of the bill, nor the specific prayer for relief, should be considered ; and all amendable defects should be treated as amended. *Ib.* 353.
4. *Injunctions to restrain violations of contracts ; upon what based.*—Injunctions to restrain violations of contracts, are based upon the necessity of protecting legal rights when the breaches are of such a nature that damages at law furnish no adequate compensation, and this depends largely on the subject matter of the contract, its purposes, and objects. *Ib.* 353.



## INJUNCTIONS—Continued.

5. *Mining property ; injunction restraining trespassers on, courts liberal in granting.*—Courts of equity, in the exercise of jurisdiction to restrain trespasses on lands, or stay waste, are more liberal, and exercise a greater latitude in protecting mining property, than in cases of other injuries, since the injury, if continuous is not temporary, but is permanent, ruinous, and not capable of adequate compensation in damages at law. *Ib.* 353.
6. *Injunctions ; motions to dissolve in cases of trespass to lands, Chancellor has greater discretion than in other cases.*—On motions to dissolve injunctions on the denials contained in the answer, the rule that if the equity of the bill is met and controverted in the answer, the injunction should be dissolved, is more flexible, and the Chancellor has a wider discretion, when the bill seeks to restrain trespasses, or stay waste on mining lands, than to stay proceedings at law ; and if irreparable damage might result from a dissolution, and the complainant would be entitled to relief on the final hearing, the injunction may be retained. *Ib.* 353.
7. *Injunction of sale under mortgage before account, notwithstanding denials of answer.*—When the bill seeks an injunction of a sale under a mortgage, and an account of the mortgage debt, alleging full payment and satisfaction thereof ; while the answer, denying the allegation of payment, speaks doubtfully of the amount due, and admits that the property is worth at least double the balance claimed to be due ; the accounts being complicated, and the original parties dead, "the safe rule is, to retain the injunction until the account is taken." *Hinson v. Brooks*, 491.

See NUISANCES, JUDGMENTS AND DECREES.

## INSOLVENT ESTATES.

1. *Filing claims against insolvent estate.*—When a claim against an insolvent estate, duly verified, is filed within nine months after the declaration of insolvency (Code, § 2568), the failure of the probate judge to register or docket it, does not invalidate the filing ; but, when the creditor relies upon a filing made before the decree of insolvency, he must show that the claim was verified as a claim against an insolvent estate, and was duly registered or docketed so as to afford notice and opportunity for filing objections to it. (Explaining *Levert v. Read*, 54 Ala. 529, and *Shelton v. Poulson*, 60 Ala. 578.) *Henderson v. Henderson's Adm'r*, 519.

## INTEREST.

1. *Interest ; attaches from maturity of debt.*—Unless there is an agreement to the contrary, interest attaches as an incident to a debt, from the moment it is due. *Park et al. v. Wiley*, 310.
2. *Same ; what absolves debtor from payment of.*—A tender of the amount due, at the maturity of the debt, or a subsequent tender of that amount, including accrued interest, if not merely gratuitous, will absolve the debtor from future liability for interest. *Ib.* 310.
3. *Interest ; when commences on contracts to pay money.*—Contracts for the payment of money bear interest from the day it becomes payable. *Talladega Ins. Co. v. Peacock, Adm'r*, 253.
4. *Same ; trivial error as to, will not reverse case.*—A note made April 6, 1863, and due one day after date, bears interest from April 7th, 1863, and a charge asserting that it bore interest from date is erroneous ; but where, instead of calling attention to this error by a proper charge, an erroneous charge, "that no interest should be computed," was requested, the error should not avail to reverse the judgment. *Ib.* 253.

## JUDGMENTS AND DECREES.

1. *Judgment rendered by judge related to parties to suit; effect of.*—A judgment rendered by a judge, who is related to any of the parties to the suit within the fourth degree, is reversible, or voidable, but is not void, and can not be set aside, when collaterally assailed. *Trawick's Heirs v. Trawick's Adm'rs*, 271.
2. *Probate court has no jurisdiction to vacate voidable decree after term at which it was rendered.*—When a voidable decree is rendered by the Probate Court, on final settlement of an estate, and no appeal from it has been prosecuted, all its provisions and terms become *res adjudicata*; and, after the term at which it was rendered, the Probate Court has no jurisdiction whatever to vacate the decree, or retry the question therein settled. *Ib.* 271.
3. *Judgments; amended nunc pro tunc without notice.*—The practice of permitting judgments to be amended, *nunc pro tunc*, without notice, is established in this State. *Nabers, Adm'r, v. Meredith et al.* 333.
4. *Same; amended so as to show amount.*—When, in a suit on a promissory note, which was properly described in the complaint, a judgment was rendered by default, and the docket of the presiding judge showed this fact, the omission to state the amount of the damages is a mere clerical error, its amendment is a ministerial act, and was allowable at common law, even before the statute of jeofails. *Ib.* 333.
5. *Same; effect of amending, and what amendments permissible.*—Judgments are amended *nunc pro tunc*, merely to supply matters of record evidence, not to modify or introduce new facts, and, except as to rights of third persons, are retrospective, and are enforced in the same manner, and to the same extent, as if entered at the time the judgment was originally rendered, so that the right is not affected by the death of a party, or by the fact that the plaintiff in motion, who was administrator of the plaintiff's estate, had been appointed administrator on the estate of one of the defendants. *Ib.* 333.
6. *Same; statute of limitations does not run against amendments made nunc pro tunc.*—At common law, the period within which judgments might be amended *nunc pro tunc*, was not limited, and, under our statutes, the right can not be barred before the expiration of twenty years, the time allowed for reviving judgments by *scire facias*. *Ib.* 333.
7. *Judgment; is not such a contract as that transferee may sue in his own name.*—A judgment is not such a contract as comes within the influence of the statute, (Code, § 2099), authorizing indorsees to sue on written contracts for the payment of money in their own names, and the transferee of a judgment cannot sue on it in his own name. *Lovins et al. v. Humphries*, 437.
8. *Same; when assignee of, cannot maintain action on.*—When one of several plaintiffs in execution assigns his interest in the judgment, the assignee can not maintain a separate action against the sheriff for failing to pay over money collected on the execution, unless it was based on his express promise to pay to the transferee that part of the money to which the transferor would be entitled. *Ib.* 437.

## JURORS AND JURY.

1. *Age; when no disqualification for jury service.*—A man qualified to serve as a juror, is exempt when he reaches the age of sixty years, but such exemption is a personal privilege, which he may waive or assert. Age does not disqualify, unless the person is under twenty-one or over seventy years of age.

## JUSTICE OF THE PEACE.

1. *Justices of peace; when has no jurisdiction in action of trover.*—Justices of the peace have no jurisdiction, in actions of trover, when the amount of the damages claimed exceeds fifty dollars. *Burns v. Henry, 209.*
2. *Jurisdiction; when want of is apparent on the pleadings, how taken advantage of.*—When in an action of trover before a justice of the peace, the justice's want of jurisdiction is apparent on the complaint, and, in the judgment, the defendant is not put to his plea, but may take advantage of it, by a motion to dismiss the case. *Ib. 209.*
3. *Same; when want of is not apparent on the face of proceedings, how advantage taken of.*—In such a case, if the justice's want of jurisdiction does not appear on the face of the complaint, the facts which show it must be set up by plea in abatement to the jurisdiction. *Ib. 209.*

## LANDLORD AND TENANT.

1. *Lessee: lessor covenants to give possession to, unless stipulation to the contrary in lease.*—When there is no stipulation to the contrary in the lease, the lessor impliedly covenants, that the demised premises shall be open to entry, by the lessee, at the time fixed by the contract for him to take possession. *King v. Reynolds, 229.*
2. *Same; when no implied covenant to give possession to.*—But if, after the time when the lessee is entitled to possession, under the lease, whether he has actual possession or not, a stranger trespasses on, or takes possession of, and holds the lands, this is a wrong to the lessee, for which the lessor is not responsible. *Ib. 229.*
3. *Possession; when question for the jury, whether it is open to lessee.* When in an action by a lessee against his lessor, for a breach of the implied covenant to deliver possession, the evidence is conflicting, as to whether a trespasser was in possession of the lands, at the time fixed in the lease for taking possession, it is error to refuse a charge which submits this question to the jury. *Ib. 229.*
4. *Landlord's lien under former statute (Rev. Code, § 2963), did not follow crop into hands of purchaser without notice.*—Under the former statutes (Rev. Code, §§ 2961-63), giving the landlord a lien on the rented lands for the rent of the current year, and a remedy by attachment to enforce it, it was expressly provided that such attachment might be levied on the crop in the possession of the tenant, or of any one holding it in his right, or in the possession of "a purchaser from him with notice of the lien"; which words were held to prevent, by necessary implication, the lien from following the crop into the hands of a purchaser without notice, though it continued after the removal of the crop from the rented lands, and until it passed into the hands of such a purchaser. *Scaife & Co. v. Stovall, 237.*
5. *Landlord's lien; liability of crop in hands of purchaser determined by common law.*—Under the present statutes (Code, §§ 3467-78), the lien is extended and enlarged in some respects, but is silent as to the persons in whose possession the crop may be levied on by attachment, leaving that question to be determined by the principles of the common law. *Ib. 237.*
6. *Landlord's lien; nature and characteristics of.*—The landlord's lien is an incident, attached by the statute to the relation of landlord and tenant, and is a simple legal right to charge the particular property with the payment of the particular debts, and it does not change the ownership of the crops, which resides in the tenant, nor put any restraint on the tenant's unqualified right to their enjoyment, except such as is necessary to preserve the



LANDLORD AND TENANT—*Continued.*

- lien, as the primary charge for the satisfaction of the preferred debts. *Ib.* 237.
7. *Same; against whom it prevails.*—The landlord's lien prevails against the tenant, while he has possession of the crops, and against volunteers and purchasers from him, with notice. *Ib.* 237.
  8. *Same; against whom it does not prevail.*—The landlord's lien will not prevail against those who purchase from the true owner, for a valuable consideration without notice of the lien, and after the removal of the crops from the rented premises. *Ib.* 237.

## LEGACY AND DEVISE.

1. *Legacies, general and demonstrative; what are.*—General legacies are those which are payable out of the general assets, and abate in case of a general deficiency; demonstrative legacies are bequests of specified sums of money with the superadded direction to pay out of a particular fund, but if the fund fail, such legacies are payable out of the general assets not specifically bequeathed, or out of funds covered by residuary bequests. *Maybury et al. v. Grady*, 147.
2. *Specific legacies; what are.*—Where testator provided in his will that if a litigated claim should be decided in his favor, "one-half of the net proceeds realized therefrom should go to his wife, and from the other half, if it should amount to \$25,000, the sum of \$10,000 should be paid to Q. to complete the cathedral, and if said half should be less than \$25,000, then out of the remainder, after taking two-fifths for the cathedral, \$2,000 each should be given to J. and S. and B. and M., and Mrs. M.," the remainder going to testator's daughter under other provisions of the will; and if the fund should not be sufficient to pay the special legacies in full, then they should be paid *pro rata*; the legacies given thereby are specific legacies as distinguished from general or demonstrative legacies. *Ib.* 147.
3. *Residuary legatee; who is not.*—Where a testator, after having specifically disposed of his personal property, gave the "rest and residue of all his property" in trust to his executors, except certain contingent legacies, to manage and control for the benefit of his infant daughter until she reached the age of twenty-one years, when he directed them to deliver it over to her, there is an express devise to her of his real estate, and she does not take as a mere residuary legatee. *Ib.* 147.
4. *Charge of debts on devised property; certain words create.*—A clause in a will in these words: "I desire all my just debts and funeral expenses to be paid as soon after my decease as practicable," would, according to the doctrines of English equity jurisprudence, create a charge by implication, on property devised by the will. *Lewis v. Ford*, 143.
5. *Same; doctrine not recognized in Alabama.*—But this doctrine being opposed to the spirit and policy of our statutes, which expressly charge the whole property of every decedent with the payment of his debts, and vest the Probate Court with plenary power for subjecting such property to their speedy satisfaction, is not of force in this State. *Ib.* 143.
6. *Same; how charged to prevent bar of statute of limitations from attaching.*—There must be words in the will creating a specific charge or an express trust, to take a debt out of the operation of the statute of limitations, and no charge raised by implication will do so. *Ib.* 143.
7. *Charge of debts on personal property; what words create.*—Where a testator provided in his will that "after the payment of my just

LEGACY AND DEVISE—*Continued.*

debts, &c., I give and bequeath one-half of my entire personal property to my wife A.,” and makes no further disposition of that which might remain after the payment of debts, a special charge is created by these words on the personal property for the payment of the debts. *Maybury et al. v. Grady*, 147.

LEGAL TENDER.

1. *United States treasury notes legal tender.*—United States treasury notes are, equally with gold and silver, a legal tender at their nominal value for the payment of debts, whether such debts were contracted before, or after, the passage of the acts of Congress authorizing their issue, and declaring them a legal tender. *McElderry v. Jones*, 203.

LIEN.

1. *Liens; operation of statute of limitations on.*—All liens for the payment of debts are in the nature of collateral securities, and may be given without affecting the right of the debtor to rely on the statutes of limitation, as a bar to an action in which a personal judgment would be rendered against him, on the debt, operating on all his property. *Ware et al. v. Curry*, 274.
2. *Same; same.*—The corresponding principle, that liens are preserved, although the remedy on the debt may be barred by the statute of limitations, prevails both in courts of law, and in courts of equity. *Ib.* 274.

LIEN OF LANDLORDS. See LANDLORD AND TENANT.

LIEN OF VENDORS. See VENDOR AND PURCHASER.

LIEN OF MATERIAL MEN.

1. *Lien of material-men; character of, and how perfected.*—The lien given by the statute to material men, is neither a *jus in re*, nor a *jus ad rem*, but simply a right to charge the property affected by it with the payment of the particular debt, in preference and priority to other debts, on compliance with the requisitions of the statute; and it is inchoate until perfected by the rendition of a judgment *in rem*, in the mode pointed out by the statute. *Porter v. Miles*, 130.
2. *Same; what complaint in action to enforce must contain.*—In an action brought to enforce such a lien, the complaint must contain all the averments necessary to charge the debtor personally, and all the facts necessary to constitute the lien, and must describe the property sought to be charged. *Ib.* 130.
3. *Same; what judgment thereon must contain.*—The judgment in such action must correspond with the complaint, and though founded on a complaint containing all the necessary statutory averments, is insufficient to perfect the lien, if it be only a judgment in the ordinary form in a personal action. *Ib.* 130.

LIEN, MECHANIC'S.

1. *Mechanic's or builder's lien law; how construed.*—A builder's or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it, and the courts can not extend the statute to meet facts and circumstances for which the statute itself does not provide, but which the courts think of equal merit with those provided for by the statute. *Copeland v. Kehoe & Ramsey*, 594.

LIEN, MECHANIC'S—*Continued.*

2. *Act approved April 19th, 1873; construction.*—The statute, by its own terms, limited the lien to the title or estate of the party contracting for the improvements. *Ib.* 594.
3. *Same; when lien is created by.*—The lien created by the statute being an incident to an express contract, it follows of necessity, where there is no valid contract, there is no lien. *Ib.* 594.

## LIMITATIONS, STATUTE OF.

1. *Statute of limitations; how taken advantage of.*—In all courts the statute of limitations is in the nature of a personal defense, and must be specially pleaded, according to the practice and procedure of the court, or it will be regarded as waived. *Bolling v. Jones*, 508.
2. *Statute of limitations; how time between death and grant of letters computed in calculating bar of.*—In calculating time between the death of a person and the grant of letters on his estate, the day of his death must be included, and the day on which the letters are granted must be excluded in computing the time necessary to bar an action against the administrator. *Allen, Adm'r, v. Elliott et al. Adm'r*, 432.
3. *Statute of limitations; note barred by in this case.*—Where a note was made April 18, 1861, the statute of limitations beginning to run on September 21, 1865, and continuing to run until the death of the maker, which occurred February 24, 1866, whereupon it was suspended until April 30th, 1866, when letters of administration were granted, and for six months thereafter, and action was brought on the note against the administrator of the estate of the maker on May 27, 1872, such action was barred by the statute of limitations of six years, by one day. *Ib.* 432.
4. *Sunday; when statutes of limitations expires on that day, action to be brought on Saturday preceding.*—When an action would be barred by the statute of limitations on Sunday, that day must be excluded from the count, and the action brought on the Saturday preceding, to save the bar. *Ib.* 432.
5. *Statutes of limitation; their operation and effect.*—Statutes of limitation do not annul contracts, or extinguish debts, they only bar such remedies as are specified in them; and where there are several remedies, to which a person seeking to enforce a contract, or collect a debt, may resort, the statute may bar one remedy, without affecting the right to resort to another. *Ware et al. v. Curry*, 274.
6. *Statute of limitations, applies in equity to bill for conversion of stock.* Six years is the statutory bar to an action at law for the recovery of damages for the conversion of personal property, and the same limitation applies to a suit in equity which seeks to hold the defendant responsible for the conversion of shares of stock in an incorporated association. *Underhill, Receiver, v. The Mobile Fire Department Ins. Co.* 45.
7. *Same; defense of; when available on demurrer.*—When a bill in equity shows on its face that the claim asserted is barred by the statute of limitations, the defense is available on demurrer, and, if facts exist which take the case out of the operation of the statute they should be averred in the bill. *Ib.* 45.
8. *Same; when does not run.*—The general principle is well settled that the statute of limitations does not run when there is no one who has the right and the capacity to sue, and when there is no one capable of being sued; but the qualification of the principle is equally well settled, that when the statute has once commenced to run, it does not cease running on account of any intervening disability to sue or be sued. *Ib.* 45.



LIMITATIONS, STATUTE OF—*Continued.*

9. *Indefiniteness in bill; complainant has no advantage from.*—The complainant in a bill can claim no advantage or benefit from the indefiniteness of its allegations since he is presumed to state his case as fully as the facts will justify. *Ib.* 45.
10. *Same; begins to run on appointment of special administrator.*—A special administrator, though appointed with reference to the pendency of a particular suit, has the same power of collecting and preserving the assets, and of maintaining suits for that purpose as a general administrator, and hence, the statute of limitations runs from the time of his appointment. *Ib.* 45.
11. *Same; ignorance of right will not take case out of statute.*—Ignorance of his rights on the part of complainant, not superinduced by the fraud or connivance of the defendant, does not take the case out of the operation of the statute of limitations. *Ib.* 45.
12. *Statute of limitations; suspended on death of debtor*—On the death of the debtor the operation of the statute of limitations can not be stayed or suspended longer than six months (Code, § 3244), without regard to the time when administration is granted on the estate. *Lewis v. Ford*, 143.
13. *Estoppel not created against widow by payment on debt of intestate by her.*—Where a testator devised his lands to his widow, and she, without taking out letters testamentary or of administration on his estate recognized a debt as valid and subsisting against his estate, and made partial payments on it; *held*, that this did not estop her or her personal representative from pleading the statute of limitations in bar of an action by the creditor. *Ib.* 143.
14. *Statute of limitations; when operative in favor of vendee of lands under executory contract of sale.*—After payment of the purchase-money of lands, the possession of a vendee, holding under an executory contract of sale, is antagonistic to his vendor, and if held continuously for the prescribed statutory period, without any recognition of, or any subordination to, the legal title of the vendor, his right of entry or of action is barred. *Potts v. Coleman*, 217.
15. *Same; when not operative in favor of vendee under executory contract.*—Until the expiration of the period prescribed by the statute of limitations, a vendee in possession of lands under an executory contract of sale, and those who claim under him, have only an equity, which will not bar an action of ejectment, or the statutory real action. *Ib.* 217.
16. *Statute of limitation; when not considered by Supreme Court.*—This court will not consider the effect of the statute of limitations as a defense to a bill in equity, unless properly raised by the pleadings. *Parker et al. v. Jones' Adm'r, et al.* 234.
17. *Same; facts taking plaintiff's case out of, introduced by amendment.*—When the statute of limitations is set up as a defense to a bill in equity, any particular facts taking the plaintiff's case out of the operation of the statute, must be introduced by amendment to the bill, or by special replication to the plea. *Ib.* 234.
18. *Distinction between the effect of lapse of time in asserting equity where the trusteeship is uniformly admitted to exist, and where its existence is repudiated.*—When the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim by the trustee, lapse of time constitutes no bar to relief. But where the trust relation is repudiated or time and long acquiescence have obscured the nature of the trust, a court of equity will refuse relief upon the ground of its inability to do complete justice. *Nettles v. Nettles*, 599.
19. *Effect of staleness of demand.*—The doctrine of staleness in a demand will often authorize a Court of Chancery to refuse relief to

LIMITATIONS, STATUTE OF—*Continued.*

- a complainant in cases where no statute of limitations applies. *Ib.* 599.
20. *Policy of the law.*—It is of the utmost moment that there should be some end of law suits, and reasonable diligence in the assertion of one's rights is properly exacted, not less than the exercise of conscience and good faith. *Ib.* 599.

## MARSHALLING.

1. *Mortgages ; marshalling assets between.*—When mortgages, held by senior and junior incumbrancers, cover, in part, the same property, and the mortgagor is insolvent and the entire property is insufficient to pay both debts, the junior may compel the senior mortgagee to exhaust the fund on which he alone held a lien before resorting to that covered by both mortgages. *Turner v. Flinn et al.* 529.
2. *Same ; same.*—While in such a case the senior must do nothing to injure or embarrass the junior incumbrancer, the former is not required to become active ; and where the senior mortgagee had, before the junior mortgagee filed his bill to assert this right, sold all the property covered by both mortgages, the doctrine of marshalling has no application. *Ib.* 529.
3. *Marshalling assets to pay debts as between specific legacies and specific devises.*—Where a testator devised his lands in terms which are in substance specific, and bequeathed his personal property in specific legacies, leaving an insufficiency of property not thus devised to pay his debts, and provided in his will : "After payment of all my just debts I give to A. one-half my 'entire personal property,' and the balance to my executors to hold in trust," &c. ; providing, also, that one-third of the net income of his real estate should be given to his wife in lieu of dower ; this personal property constitutes the primary fund for the payment of such debts, and the remaining debts unpaid therefrom constitute a common and equal charge on the whole balance of the estate, excluding the one-third given to the wife in lieu of dower. *Maybury v. Grady et al.* 147.

## MASTER AND SERVANT.

1. *Master ; when responsible to servant for personal injuries.*—For injuries proceeding from the personal fault, or negligence of the master, he is under the same liability to his servant as to third persons, towards whom he sustains no special relation ; but he is not liable for injuries caused by the negligence, or fault of other servants in the same employment, which are the risks incident to the common employment, and which each servant is presumed to contemplate when he enters the service. *Smoot v. Mobile & Montgomery R. R. Co.* 13.
2. *Same ; what care he must use in furnishing materials to servant.*—The master is bound to use ordinary care—such care as men of ordinary prudence exercise under like circumstances for their own protection, in the selection of careful and skillful servants, and in furnishing fit and safe materials, and appliances or machinery necessary and proper for the service, and for injuries arising from a breach of this duty in either particular, he is liable to a servant, but he is not to be understood as insuring, or warranting the safety, or fitness of the materials furnished, nor the diligence and competency of the other servants in the performance of their respective duties. *Ib.* 13.

## MOBILE, CITY COURT OF.

1. *City Court of Mobile; power of to adjourn.*—Under the provisions of the Act of January 15, 1877, to regulate the sessions of the City Court of Mobile, the terms for criminal business may continue until the business is disposed of, and the court having met at the time and place appointed, if it has the inherent power to adjourn for a week, and organize a grand jury when again in session on the day to which it was adjourned. *Williams v. The State*, 183.

## MONEY HAD AND RECEIVED.

1. *Money had and received; when principal may maintain against agent.* To enable the principal to maintain an action for money had and received against a person to whom the agent has paid the principal's money, in discharge of his own debt, it must be shown that the agent is in default to the principal, and that the latter had not the means of indemnity in his hands. *Mobile & Montgomery Railway Co. v. Felrath*, 189.

## MORTGAGE.

1. *Mortgage of unplanted crop conveys only equitable title.*—A mortgage of an unplanted crop conveys only an equitable title which will not support trover, detinue, or trespass. *Elmore v. Simon & Bro.* 526.
2. *Consideration of mortgage; recitals, and burden of proof.*—When the validity of a mortgage is assailed by creditors whose debts were in existence at the time it was executed, its recitals of a consideration are not evidence against them, and the *onus* is on the mortgagee to prove his debt. *Bolling v. Jones*, 508.
3. *Entering satisfaction of mortgage on record; transfer before request; admissibility of record of pending suit by assignee.*—When a mortgage has been transferred before request to enter satisfaction on the record, the mortgagee is not liable to the statutory penalty for a failure or refusal to enter satisfaction on request afterwards made (Code, §§ 2222-23); and action being brought against him to recover the penalty, the record of a suit by the assignee against the mortgagor, pending at the commencement of the action, is competent evidence to prove notice of the transfer, if for no other purpose. *Harris v. Swanson & Bro.* 486.
4. *Fraudulent foreclosure of mortgage.*—A decree foreclosing a mortgage will not be set aside, at the instance of a creditor of the mortgagor, because of a fraudulent intent on the part of the mortgagor (who was the defendant in the decree), unless the mortgagee and complainant had knowledge of such fraudulent intent, participated in it collusively, or had knowledge of facts sufficient to charge him with notice. *Cromelin v. McCauley*, 542.
5. *Validity of mortgage assailed for fraud.*—A mortgage will not be held fraudulent at the instance of creditors, merely because it was given to secure an antecedent debt, and the mortgagee knew that the mortgagor was financially embarrassed. *Ib.* 542.
6. *Payment of mortgage debt no defense to action by mortgagee.*—Under a mortgage of chattels, payment of the mortgage debt, before action brought, will defeat a recovery; but, in reference to mortgages of real estate, this court has adopted a different rule, and holds the mortgagee entitled to recover at law, as against the mortgagor and those claiming under him, whenever the mortgage is silent as to his right to take possession, or when the period has expired during which the right of possession is reserved to the mortgagor, and payment of the debt will not defeat a recovery in such action; though "it seems to be settled, that as against all persons, except



MORTGAGE—*Continued.*

- the mortgagee and those claiming in his right, the legal title is in the mortgagor until foreclosure." *Slaughter v. Doe*, 494.
7. *Mortgaged property; equity will interfere to prevent the removal of from the State.*—A court of equity will interfere, before the law day of the mortgage, and before the mortgagee has a right to proceed at law, and restrain the removal of the mortgaged property beyond the jurisdiction of the court. *Walker v. Radford*, 446.
  8. *Seizure, writ of; allowed under statute to prevent removal of mortgaged property.*—When a case for equitable interference is shown, the statute (Code, §§ 3857-3853) authorizes a writ of seizure to prevent the removal of mortgaged property beyond the State, instead of an injunction, which would be the appropriate remedy in the absence of the statute. *Ib.* 446.
  9. *Removal of mortgaged property out of the State; ground of equity to prevent.*—The ground of equitable interference, in such cases, is the prevention of injury to the present or future rights of the mortgagee, and the injury must be shown, and it must appear that the mortgagor, or those claiming under him, have done, or are about to do, some act which violates the mortgagee's rights and beyond the rights of the mortgagor, and for which the law does not give an adequate and appropriate remedy. *Ib.* 436.
  10. *Same; temporary removal of property no ground for equitable interference.*—But the mortgagor is not to be hindered in the legitimate use of the property, and a mere temporary removal of the property out of the State, accompanied by an honest intention to return it before the law day of the mortgage, and without any intention to affect, embarrass, or impair the rights of the mortgagee, will not authorize a court of equity to interfere by injunction, or the statutory writ of seizure, to prevent the removal of the property. *Ib.* 446.
  11. *Mortgagee; when he is a purchaser for a valuable consideration.*—When a mortgage is taken as security for a pre-existing debt, the mortgagee is not a purchaser for a valuable consideration, but the rule is different when the mortgage is taken for a debt contemporaneously created, or when the day of payment is extended. *Craft v. Russell*, 9.
  12. *Mortgage, sale of lands under; when a nullity.*—A sale of lands, under a power of sale contained in a mortgage, which rests wholly in parol, does not divest the mortgagee of the legal title, nor cut off the mortgagor's equity of redemption, and is a mere nullity. *Jackson et al. Adm'rs, v. Scott et al.* 99.
  13. *Same; payment of mortgage debt, no defense to action of ejectment.*—Payment of the mortgage debt, in whole or in part, after forfeiture, is no defense to an action of ejectment by the mortgagee. *Ib.* 99.
  14. *Senior and junior mortgagees; breach of agreement between, no ground of equitable jurisdiction.*—When a senior and junior mortgagee, whose mortgages covered, in part, the same property, agreed that if the junior mortgagee would not advertise under his mortgage, the senior mortgagee would, after satisfying his debt, turn over the surplus of the proceeds of the sale of property which was mortgaged to him alone, to the junior mortgagee, an action at law would lie for the breach of such an agreement, which furnishes no ground of equitable jurisdiction. *Turner v. Flinn et al.* 529.

## MUNICIPAL CORPORATIONS. See CORPORATIONS.

## NEGLIGENCE.

1. *Contributory negligence; infant not guilty of.*—An infant under six years of age, is not of sufficient discretion to be guilty of contributory negligence. *Bay Shore R. R. Co. v. Harris*, 6.

## NEGLIGENCE—Continued.

2. *Employee ; when may recover damages sustained by reason of defective materials, &c.*—While a passenger may recover damages from a railroad company on a presumption of negligence, whenever injuries are received because of unfit instrumentalities employed in his transportation, a servant or employee of the company can not recover without proof of negligence, either in the selection of instrumentalities originally defective and unsafe, or in the use of unsafe instrumentalities after knowledge of their defective condition ; and such knowledge on the part of a fellow servant is not sufficient to charge the company with notice of the defect. *Smoot v. Mobile & Montgomery R. R. Co.* 13.
3. *Contributory negligence ; rule as to defense of, stated.*—When contributory negligence is relied on as a defense to an action for damages, it is not essential that the plaintiff should have been the cause of the injury, for if his negligence contributed proximately to an injury which he could have avoided by the use of ordinary care or diligence, he can not recover. *Gothard v. Alabama Great Southern R. R. Co.* 114.
4. *Same ; when no defense.*—Although one negligently exposes himself to peril, yet, if he uses proper diligence in escaping the danger when it becomes apparent, and the defendant fails to use all the proper means in his power to avert the danger, the defendant is liable, and the original negligence is no defense to the action. *Ib.* 114.
5. *Same ; negligence to walk or drive on railroad track without looking out for trains.*—When, in action against a railway company to recover damages for personal injuries, the evidence shows that the plaintiff placed himself in peril by driving his wagon and team on a crossing without looking out for approaching trains, at a place where his view was so obstructed that he could not see a locomotive which was approaching, and near at hand, and by which he was struck and injured, it is such negligence as precludes a recovery, unless the defendant could have averted the injury by the use of all means which were reasonably capable of adoption for the purpose. *Ib.* 114.
6. *Negligence to run trains in a city at a speed prohibited by ordinance.* It is negligence to run a railway train within the limits of a city at a rate of speed which is prohibited by a municipal ordinance, but when the speed allowed by the ordinance was six miles per hour, and an accident occurred when a train was running at less speed than was prohibited, and the bell was being rung when an injury was inflicted, this would be, *prima facie*, the exercise of due caution. *Ib.* 114.
7. *Contributory negligence ; defense of vitiated when injury inflicted intentionally.*—When contributory negligence is relied on, as a defense to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome. *Cook, Adm'r, v. Cen. R. R. & Banking Co. of Ga. et al.* 533.
8. *Same ; when defense of vitiated, although injury not inflicted intentionally.*—When, in an action to recover damages for personal injuries, the defense of contributory negligence is relied on, the defendant is liable, although the plaintiff's negligence essentially co-operated to produce the injury, when it could have been averted by the exercise of reasonable care and prudence on the part of the defendant, or his servants, after discovering the danger in which the party injured stood. *Ib.* 533.
9. *Comparative negligence ; doctrine of, does not prevail in this State.* The doctrine of "comparative negligence" does not prevail in

NEGLIGENCE—*Continued.*

- this State; and charges based on it are properly refused. *Ib.* 533.
10. *Contributory negligence; when not invoked against person in danger.* Contributory negligence is not charged upon one who suddenly acts wildly when peril comes upon him unwarned, and in the absence of any evidence throwing light on the matter, he will be presumed to have used that care and precaution which the law requires, and to which instinct would prompt him in saving his life. *Ib.* 533.
  11. *Negligence of person walking on railway, in avoiding danger, must be submitted to the jury.*—When a person, walking over a long trestle on a railway, let himself down under the ties to avoid being run over by an approaching train, but being unable to get upon the track again, fell and was killed, a charge which submitted to the jury the question of his negligence in attempting to cross the trestle, but which ignored the question of due caution in regaining his position, on which there was evidence, was misleading and properly refused. *Ib.* 533.

## NOTICE.

1. *Record of written contract, when not notice.*—The record of a written contract for the conditional sale of personal property, in the office of the judge of probate, is unauthorized by statute, and is not notice to a sub-purchaser, of the claim of the original vendor. *Fairbanks, Morse & Co. v. The Eureka Co.* 109.
2. *Notice to produce papers, insufficient.*—A notice to the plaintiff to produce on the trial letters received in answer to letters written on his behalf by "P.", will not render admissible proof of the contents of letters written to "P." This would be to admit secondary evidence of the contents of letters without proof of their loss or destruction, and without any proper predicate for its introduction. *Mobile Life Ins. Co. v. Egger*, 134.
3. *Notice of fact, when imputed.*—A person is chargeable with notice of a fact, when the circumstances were sufficient to put him on enquiry, and the fact could have been ascertained by the use of reasonable diligence. *Mobile & Montgomery Railway Co. v. Febrath*, 189.
4. *Notice to deputy sheriff, when equivalent to notice to sheriff.*—Notice to a deputy, appointed by a sheriff, and authorized to make a levy of an attachment, at the time he makes such levy and takes possession of the property, of the existence of a former lien, is notice to the sheriff. *Scarborough v. Malone et al.* 570.
5. *Notice to directors of solvency of bank; what is.*—An insurance company engaged in a general banking and insurance business, having a capital of \$100,000, of which \$70,000 is loaned out on mortgages of real estate of the same (but no greater) nominal value, cannot be considered in a healthy or prosperous condition; and its directors being chargeable with a knowledge of its condition, when they are sought to be charged with the loss of trust funds borrowed from a guardian, on whose bond they are sureties, cannot claim to have acted in ignorance. *Lee v. Lee*, 406.

## NUISANCES.

1. *Nuisance; equity has jurisdiction to restrain.*—The jurisdiction of courts of equity to restrain the commission or continuance of nuisances, public or private, is well settled, and has been frequently recognized in this court; it is founded on the ability of the court to afford more complete relief than courts of law can grant. *Ogletree v. McQuaggs et al.* 580.
2. *Same; when trial of action or issue at law necessary before equity will enjoin.*—If the thing sought to be prohibited is in itself a nuisance



NUISANCES—*Continued.*

the court will interfere to stay irreparable mischief, without waiting for the result of a trial at law; and will, according to the circumstances, direct an issue, or allow an action at law, and even expedite the proceedings, if necessary, continuing the injunction in the meantime. But, when the thing sought to be restrained is not necessarily obnoxious, but only may prove so according to circumstances, then the court will refuse to interfere until the matter has been tried at law—generally by an action, but sometimes, where an action could not be properly framed, on an issue out of chancery. *Ib.* 580.

3. *Same; evidence required before equity will declare thing to be without trial of issue.*—Unless the evidence is full, clear, and convincing, the court will not take upon itself to decide, without an issue at law, that a nuisance in fact exists, or that a thing which may or may not become a nuisance will so operate. *Ib.* 580.
4. *Mill-dams; when erection of restrained without action at law.*—A nuisance which operates to destroy health, or to seriously diminish the comfortable enjoyment of a dwelling-house, is productive of irreparable mischief, for which no adequate remedy at law can be given; and the erection of dams, or other obstructions, which materially affect the natural flow of a running stream, and injure the health of persons living in the neighborhood, has been restrained by injunction, without waiting the result of an action, or the trial of an issue at law. *Ib.* 580.
5. *Same; statutory policy as to erection of, followed in courts of equity.* From a very early period in the history of this State, down to the present time, the erection of mill-dams, or other similar obstructions of a running stream, have been controlled by statutory provisions, which indicate a settled policy to subordinate the right of the proprietor to build such structures to the preservation of the health of the neighborhood; and in the class of cases to which these statutory provisions relate, the jurisdiction of courts of equity should be exercised in furtherance of this policy. *Ib.* 580.

## PARTITION.

1. *Partition; proceedings for sale of land for, on petition not containing jurisdictional averments, is void.*—A proceeding before the probate judge for the partition of land among several joint tenants, or tenants in common (Code, § 3514), is *coram non judice* and void, when the petition does not contain the averments necessary to give the court jurisdiction. *Johnson et al. v. Ray*, 603.
2. *Same; when petition for sale of lands for is fatally defective.*—In this case the petition is fatally defective, because it does not appear to have been filed by any person entitled to ask a partition; and because it does not set forth the interest of each tenant in the land; and because it does not specify the number of shares into which the land or money is to be divided. *Ib.* 603.

## PARTNERSHIP.

1. *Bona fide holder of partnership note, who is not.*—One who knowingly takes the negotiable note of a partnership in payment of the individual debt of one of the partners, is not a *bona fide* holder or purchaser of such paper, and cannot enforce it against the other partners. *Tyree v. Lyon, Murphy & Co.* 1.
2. *Partnership; may be created as to third persons by the reception of profits.*—Although one may not have an interest in the capital or property employed in a particular business, yet if he has an interest in the profits of such business, as profits, this will constitute him a partner as to third persons. *McDonald v. The Battle House Co.* 90.

## PARTNERSHIP—Continued.

3. *Same*; contract in this case did not create partnership.—Where a contract provided that a hotel company should receive one-tenth of the gross receipts of the hotel as rent from their lessee, such participation in the gross receipts did not constitute a partnership between the lessee and the company. *McDonnell v. The Battle House Company*, 90.
4. *Promissory note of partnership*; when onus on plaintiff to show assent of partners to.—When a promissory note, purporting to have been executed by a partnership, is shown to have been signed by a partner in renewal of a note given for the debt of another firm of which that partner alone was a member, the onus is on the plaintiff to show the assent of the other partners to its execution. *Tyree v. Lyon, Murphy & Co.* 1.
5. *Same*; assent of partner to, not implied from silence.—This assent may be express or implied, but the mere silence of the other partners, when informed of the existence of the note, is not of itself evidence that they had assented to its execution. *Ib.* 1.
6. *Partnership*; effect of conveyance of lands to.—A conveyance of lands to a partnership, by its firm name, vests the title, at law, in the several partners as tenants in common. *Slaughter v. Doe, ex dem. Swift, Murphy & Co.* 494.
7. *Partners inter sese*; what constitutes.—Parties do not become partners *inter sese*, unless there is a stipulation in the agreement for a community of risks, as well as a partition of gains. *Mayrant & Co. v. Marston, Brown & Co.* 453.
8. *Same*; particular contract held not to constitute.—A contract by which two firms agreed to divide equally the profits of their business, after excluding a certain portion of such profits "to cover expenses," stipulating, also, "that the business of their respective firms should be conducted entirely separate," neither being bound to contribute anything to the expenses or losses of the other, does not constitute the two firms partners *inter sese*. *Ib.* 453.

## PARTY-WALL.

1. *Party-wall*; liability for cost of, as between adjacent proprietors, and injunction against use.—When a wall is erected by the owner of a lot, on the boundary line between his own and the adjoining lot, resting partly upon each, the law imposes no obligation on the owner of the adjacent lot to contribute to the cost of its erection; nor will a court of equity enjoin him, or a subsequent purchaser, from the use of the wall without making contribution, in the absence of a promise to contribute. *Preiss v. Parker*, 500.

## PLEADING AND PRACTICE.

## PARTIES, I.

1. *Separate estate of wife*; when husband must join in suit for.—The provision of the statute allowing the wife to sue alone (Code, § 2892), when the suit relates to her separate estate, refers only to the estate created by the laws of Alabama, and not to those created by the laws of any other State; and where the wife has an interest in the suit under the laws of such State, the husband is a proper party plaintiff. *King v. Martin*, 177.

## COMPLAINT, II.

1. *Amended complaint*; filed without leave of court.—When, in an action of trover commenced before a justice of the peace, the plaintiff files, without leave of the court, an amended complaint containing a count in case, it is error to strike such amended complaint from the files. *Elmore v. Simon & Bro.* 526.
2. *Duplicity in a complaint* not ground of demurrer.—Duplicity in a

PLEADING AND PRACTICE—*Continued.*

complaint could only be reached, at common law, by special demurrers, and since the abolition of such demurrers, is not a ground of demurrer. *Houston et al. v. Hilton et al.* 374.

3. *Complaint against one partner, with summons against partnership, and judgments against "defendants;" amendment of clerical misprision.*—In trover, the summons was against R. & A. as partners, and was returned executed "by leaving a copy with R. and R. & A., defendants;" while the complaint was against R. alone, and he alone pleaded, though R. & A. were named as defendants in the marginal statement of the parties' names in the judgment-entry, which also recited that the parties came by attorney, and the judgment on verdict was entered against the defendants. Held, on errors assigned by R. & A., each separately, and by R. & A. as partners, that R. alone was sued, and the judgment was against him alone; that the use of the word *defendants* instead of *defendant*, in the judgment-entry, was a clerical misprision, which was amendable on motion in the court below, and was no ground of reversal; and the judgment was affirmed, on all the assignments of error. *Renfro & Andrews v. Willis*, 488.

## DEMURRER, III.

1. *Demurrer; when interposed, and when considered on error.*—This court will not consider the merits of a demurrer to the complaint, when the record shows that it was interposed after a plea to the merits had been filed; nor when the record fails to show that the court below acted on it. *Renfro & Andrews v. Willis*, 488.

## IV. PLEAS.

1. *Sworn plea; when necessary.*—In an action for work and labor done at the instance of the defendant, if the complaint alleges that the claim is now due and is the property of the plaintiff, and the defendant does not by a sworn plea deny the plaintiff's ownership, no question as to it can be raised in this court. *Finnegan v. Frank*, 21.
2. *Sworn plea; when necessary to let in defense of plaintiff's want of interest.*—When a complaint contains a count on a written contract in which the name of the plaintiff appears as one of the parties, there must be a sworn plea interposed denying the interest or ownership of the plaintiff, in order to let in the defense that the plaintiff is not the person really interested. *Mobile Life Ins. Co. v. Egger*, 134.
3. *Former recovery, plea of, when defective.*—A second suit is not barred by former recovery, unless the first one was brought on the same cause of action, or on part of one and the same indivisible contract, and a plea which fails to aver, or a replication which fails to negative this fact, is defective. *Moberly v. Peek*, 345.
4. *Same; must show jurisdiction.*—A plea of former recovery which fails to aver, or show in some way, that the court which tried the first suit had jurisdiction of the subject matter, is defective. *Ib.* 345.
5. *Plea of general issue, when available.*—The plea of the general issue being limited by statute to cases "where the defendant relies on a denial of the cause of action as set forth by the plaintiff" (Code, § 2988), the defendant in ejectment can not, under the plea of not guilty, prove payment or satisfaction of the mortgage under which the plaintiff claims title. *Slaughter v. Doe et al.* *Swift, Murphy & Co.* 494.
6. *Argument before jury, regulated by the court.*—If the defendant's counsel declines to address the jury, the court may nevertheless, in its discretion, permit a concluding argument by the plaintiff's counsel. *Yeates v. Mobile & Montgomery R. R.* 164.



## POSSESSION.

## I. REALTY.

1. *Possession of lands ; evidence of title prevails over subsequent possession.* The quiet, peaceable possession of lands, for a definite period, under claim or title, and accompanied by acts of ownership, is *prima facie* evidence of a legal title, and must prevail, at law, over a subsequent possession, not shown to be under a superior legal title. *Potts v. Coleman*, 217.
2. *Same ; character of, when acquired as an advancement by parol.* When a father puts his son in possession of land, intending it as a gift or advancement, the intention resting only in parol, a mere tenancy at will is created ; and such possession can not become adverse, except by a dissolution of the tenancy, and an open, clear, positive, continuous disavowal of the title of the father, and the assertion of a hostile title which is brought to his knowledge. *Ib.* 217.
3. *Possession ; as between lessor and lessee.*—When there is no stipulation to the contrary in the lease, the lessor impliedly covenants, that the demised premises shall be open to entry, by the lessee, at the time fixed by the contract for him to take possession. *King v. Reynolds*, 229.
4. *Same ; same.*—But if, after the time when the lessee is entitled to possession, under the lease, whether he has actual possession or not, a stranger trespasses on, or takes possession of, and holds the lands, this is a wrong to the lessee, for which the lessor is not responsible. *Ib.* 229.
5. *Same ; same.*—When in an action by a lessee against his lessor, for a breach of the implied covenant to deliver possession, the evidence is conflicting, as to whether a trespasser was in possession of the lands, at the time fixed in the lease for taking possession, it is error to refuse a charge which submits this question to the jury. *Ib.* 229.

## II. PERSONALTY.

6. *Possession only prima facie evidence of title.*—The possession of personal property is only *prima facie* evidence of title, and cannot be relied on as higher evidence to divest the true owner of the title to his property. *Fairbanks, Morse & Co. v. The Eureka Co.* 109.

## PRINCIPAL AND AGENT.

1. *Principal may recover property misused by his agent.*—When an agent has misapplied or misused the property of his principal, the latter may pursue and recover it. *Mobile & Montgomery Railway Co. v. Felrath*, 189.
2. *Same ; can not recover money misapplied by agent.*—But this principal can not be applied to money which has no "ear marks," and can not be identified. When it passes to the possession of another who acquires it for a valuable consideration, and without notice, it can not be reclaimed. *Ib.* 189.
3. *Agency ; how proved.*—The general rule is, that agency must be proved otherwise than by the mere act of the agent, before it can be assumed that such acts are binding on the principal ; and the mere acts of the assumed agent, not accompanied by evidence tending to show that the principal had knowledge of, or assented thereto, are not competent evidence to be submitted to a jury. *Talladega Ins. Co. v. Peacock, Adm'r*, 253.
4. *Same ; same.*—But when there is any evidence tending to show the assent of the principal to the act of the agent, these acts, in connection with the assent of the principal thereto, must go to the jury as evidence ; and if the acts of the supposed agent are so con-

PRINCIPAL AND AGENT—*Continued.*

tinuous in their character, and of such a nature as to furnish, in themselves, any reasonable ground of inference that they were known to the principal, and that, in the absence of authority, he would not have suffered them, such acts are competent evidence to be submitted to the jury. *Ib.* 253.

5. *Agent; may testify that he made full and honest disclosure of authority.* The defendant, after he has stated all that passed between him and the plaintiff, may testify that he made a full and honest disclosure to him as to the extent of his authority to act as agent in the transaction on which the suit is founded; such a statement is equivalent to saying that he communicated all the facts within his knowledge to the plaintiff. *Ware, Murphy & Co. v. Morgan & Duncan*, 461.
6. *Promise to pay debt of another; when cannot be enforced.*—A promise, verbal or written, to pay the debt of another not founded on a precedent liability, or a new consideration, is gratuitous and can not be enforced. *Ib.* 461.
7. *Agent; when his contracts do, and when they do not bind the principal.* When a duly constituted agent contracts in the name of his principal, and does not exceed his authority, the principal is bound thereby; and, although the contract was unauthorized by the principal, if the agent was guilty of no wrong and made a full and honest disclosure of the extent of his authority to the person with whom he was dealing, and who has all the information the agent possesses of his agency, there can be no liability resting on the agent. *Ib.* 461.
8. *Principal; cannot authorize agent to do that which he cannot do himself.*—A principal cannot confer on an agent authority to do that, in his behalf, which he himself could not do if he were personally present and acting for himself.—*Ferguson v. Morris et al.* 389.
9. *Same; agent or attorney could not receive.*—But an agent or attorney has only a special authority, and is in no sense the owner of the debt, and cannot receive in payment of it anything but money, or currency which passed at par, and was considered and treated as money; and the fact that nothing but depreciated currency was in circulation, cannot enlarge his authority in this respect. *Ib.* 389.
10. *Agent signing instrument under seal; authority to be in writing, and may be examined as to.*—Authority to an agent to execute an instrument under seal, must be in writing; and where an agent, testifying to his execution of such sealed instrument, states that he had authority to execute it, he may be asked, on cross-examination, if his authority was in writing, and if it is, it should be produced, or its absence satisfactorily accounted for, but in any event he may be cross-examined as to its contents. *Elliott v. Stocks*, 336.

## RAILROADS.

1. *Employee of railroad company; when cannot recover against, for personal injury.*—A railroad company is not liable for damages, at the suit of one of its employees, for injuries received in a collision between two trains, when such collision was caused by gross negligence on the part of the officers in charge of one of the trains. *Bull v. Mobile & Montgomery R. R. Co.* 206.
2. *Same; when may recover damages sustained by reason of defective material, &c.*—While a passenger may recover damages from a railroad company on a presumption of negligence, whenever injuries are received because of unfit instrumentalities employed in his transportation, a servant or employee of the company can not

RAILROADS—*Continued.*

recover without proof of negligence, either in the selection of instrumentalities originally defective and unsafe, or in the use of unsafe instrumentalities after knowledge of their defective condition; and such knowledge on the part of a fellow servant is not sufficient to charge the company with notice of the defect. *Smoot v. Mobile & Montgomery R. R. Co.* 13.

3. *Cars and locomotives, duty of railroad companies as to inspecting.* It is the duty of a railroad company to exercise ordinary care for the inspection of its locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Ib.* 13.
4. *Engineer; duty of as to stopping trains on discovering persons on railway track.*—Ordinarily, persons who walk on railway tracks are trespassers, and the engineer is not bound to stop or check his train on discovering a person on the track, at a place where he can readily get off and escape from danger, but where the trespasser does not appear to be apprised of the impending danger, or from any cause, is unable to leave the track, the rule is otherwise. *Cook, Adm'r, v. Cen. R. R. & Banking Co. of Ga.* 533.
5. *Care; degree of required from railroad companies.*—The law demands of railroad companies, and their servants, only that degree of diligence which very careful and prudent persons take of their own affairs; infallibility is not required or expected. *Ib.* 533.
6. *"Regular depot or stopping place;" what is not, within the meaning of the statute, (Code, § 1699).*—A place, not on a public road where a railroad company was in the habit of stopping its trains, for the sole purpose of taking on or putting off passengers, who had notified those in charge of the trains to do so, and when such trains would also stop at other places for this purpose, is not a "regular depot or crossing," within the meaning of the statute (Code, § 1699), requiring the bell to be rung or the whistle blown within a quarter of a mile of such depot or crossing. *Ib.* 523.

## REDEMPTION.

1. *Redemption, bill for; necessary averment in.*—A court of equity will not enforce the statutory right of redemption in lands sold under a power in a deed of trust, when the bill fails to aver that the complainant, before it was filed, tendered the amount of the purchaser's bid, with ten per cent. per annum thereon, and demanded redemption. *Stocks v. Young*, 341.
2. *Delivery of possession, a condition precedent to the statutory right of redemption.*—It is a condition precedent to the statutory right of redemption, that the debtor shall have delivered possession to the purchaser within ten days after the sale; and a bill which fails to aver distinctly that this provision of the statute has been complied with, is without equity. *Ib.* 341.

## RELEASE.

1. *Release; duty of court to construe decree relied on as.*—When the defendant relies on a decree of the Chancery Court to show a release of the plaintiff's cause of action, the court must construe the decree, and determine from its face, whether it was intended to operate as a release, and a charge which submits this question to the jury is erroneous. *Shook v. Blount et al.* 301.
2. *Same; when parol evidence of consent of parties to decree relied on is not admissible.*—When, in such a case, the decree shows nothing on its face which operates as a release, parol evidence that the



RELEASE—*Continued.*

plaintiff's solicitors consented to the decree, is illegal and incompetent. *Ib.* 301.

3. *Release by one of several plaintiffs, or after suit brought.*—A release, executed by one of several plaintiffs, without the assent or authority of the others, does not affect their right of recovery; and when a release is executed after suit brought, it does not "bar the expense of the suit theretofore incurred." *Harris v. Swanson & Bro.* 486.

## REMOVAL OF CAUSES.

1. *Removal of causes from State to United States courts; when may be made.*—An affidavit and bond, for the removal of a cause from a State court into the United States court, is filed in time, although the case has been twice continued by the consent of the party seeking to remove it. *Elliott v. Stocks & Bro.* 290.
2. *Same.*—A petition and affidavit, filed under the act of Congress of March, 1867, to remove a cause from the courts of this State into the United States courts, which shows that the petitioner is a resident of another State, but fails to show that the opposing party is a citizen of Alabama, is fatally defective, and it is not error to refuse a motion for removal. *Ib.* 290.

## SALES.

1. *Judicial sales; relief to purchaser against.*—The doctrine of *caveat emptor* applies to judicial sales, and the purchaser can not resist the payment of the purchase-money, nor recover it if paid, because his purchase proved to be injudicious or worthless. *Bolling v. Jones*, 508.
2. *Same; sales by personal representative of, under decree, are judicial.* Sales of the lands of estates by the personal representative, under the decrees of the Probate Court, which fixes the place and terms of sale, and which are subject to confirmation by it, are essentially and strictly *judicial*. The court is the vendor, and the executor or administrator merely the agent or officer through whom the sale is made. *Cruikshank v. Luttrell*, 318.

## SET-OFF.

1. *Set-off; when will be allowed.*—If the defendant could maintain a suit in his own name on the demand which is proposed as a set-off, and if he owned it before action brought, or (if the action be by an assignee) before notice of assignment, provided the cause of action is not commercial paper, such set-off will be allowed. *Collins v. Greene*, 211.
2. *Set-off; executor sued individually can not set-off debt due him as such.* An executor, when sued individually, can not set-off against the plaintiff's demand, damages arising from the failure of the plaintiff to comply with his purchase of lands, which were sold by the register in chancery, on a bill filed by such executor to enforce the vendor's lien, held by the testator on the lands. *Ib.* 211.
3. *Set-off; what demands are available at law*—A cross demand, to be available as a set-off at law, must be such as would support an independent action at law by the defendant, at the commencement of the suit; hence, a payment of his principal's debt by the surety, after the commencement of suit against him on a debt due to his principal, is not available as a set-off in the action. *Goldthwaite v. National Bank*, 549.
4. *Same, as against assignee of note.*—As against the assignee or holder of a promissory note, suing the maker, the doctrine of set-off has never been carried further than to put him in the place of the

SET-OFF—*Continued.*

payee, or party having the beneficial interest; and a set-off in favor of the maker, against an intermediate holder, has been uniformly disallowed, in the absence of an agreement founded on new consideration, between the maker and such intermediate holder. *Ib.* 549.

## STATUTES.

1. *Statutes; read and construed with reference to the common law.*—Statutes are always read and construed in the light of the common law, and are not regarded as infringing on its rules and principles, except so far as may be expressed, or fairly implied, to give them full operation. *Scaife & Co. v. Stovall*, 237.
2. *Same; effect of charge on property created by.*—When, by a statute, a charge is created on property for the satisfaction of a debt, unless the intention is clearly expressed, or is matter of just implication, it can not be intended that such charge has a superiority, which the common law does attach to similar charges, especially a superiority which that law has carefully withheld. *Ib.* 237.

## SUMMARY JUDGMENT.

1. *Summary judgment; error to render against sheriff for failing to return execution without the intervention of a jury.*—A motion for a summary judgment against a sheriff for failing to return an execution, is not an "action founded on a written instrument ascertaining the plaintiff's demand," and it is error in such a motion, to render a final judgment by default against the defendant, without the intervention of a jury, and without the introduction of evidence to establish his liability for the alleged neglect of duty. *Warwick et al. v. Brooks*, 252.
2. *Sheriff; when entry of motion against, not notice to.*—The entry, on the motion docket, of a motion against a sheriff, whose term of office has expired, for failing to pay over money collected on execution, does not operate as notice of the motion. *Lovins et al. v. Humphries*, 437.
3. *Summary judgment; when motion for, discontinued.*—When no notice is given of a motion for summary judgment, and no action is taken on it, at the term at which it was entered, such motion is discontinued. *Ib.* 437.
4. *Same; allegations and proof must correspond, on motion for.*—When an execution is described in a motion against the sheriff, for failure to pay over money collected on it, as issued in favor of one person, and the evidence introduced relates to an execution in favor of a different person, the variance is fatal. *Ib.* 437.
5. *Same; notice and motion for, joint proceeding.*—When a notice is given to, and a motion made against, a sheriff, for failing to pay over money collected on an execution issued in favor of several persons, the notice and motion form a joint proceeding, and it is error to render judgment on the motion in favor of one of the plaintiffs in execution. *Ib.* 437.
6. *Same; when motion for, made by transferee must prove interest of transferor.*—Where a motion was made by the transferee of a judgment against the sheriff, for failing to pay over money collected on the execution issued upon it, and the transfer did not mention the judgment, but assigned the transferor's interest in an estate which was not shown to have any connection with the judgment, evidence that the judgment was embraced in the transfer, and of its connection with the estate, was essential to support the movant's right to the money collected. *Ib.* 437.

## SURETIES.

1. *Surety on rent note ; when has the right to recover value of crop from merchant, appropriating it for advances when delivered to pay rent.*—When a tenant delivers part of his crop to a surety on his note for rent, to be used in paying rent, and the latter forwards it to commission merchants, to be used for that purpose, and they, in violation of instructions, apply it in payment of advances made by them to the tenant, such surety may, after paying the rent, recover the value of the crop so delivered to them. *Shields v. Atkinson*, 244.
2. *Same ; same.*—In such case, the rent being the paramount charge on the crop, the surety has a property in, and a right to hold it, and apply it to the payment of rent, and may recover its value, although it was delivered to him for the double purpose of paying rent, and advances. *Ib.* 244.
3. *Security created by surety ; when enures to creditor.*—A security or trust created by the principal debtor for the benefit of his surety, and not limited in terms to the mere personal protection of the latter, is a security or trust for the payment of the debt, and enures to the benefit of the common creditor. *Ala. Gold Life Ins. Co. v. Anderson*, 245.
4. *Same ; same.*—But, to have this effect, the trust or security must confer on the surety a clear right to appropriate it to the payment of the common debt, and the right to retain it until the debt be paid. *Ib.* 245.
5. *Sureties of executors on supersedeas bonds ; when may recover for payment of judgment made by them.*—The execution of a supersedeas bond on appeal to this court by the executors of an estate, creates no privity between the sureties thereon and the estate ; and a payment by the sureties of the judgment on its affirmance gives them no right of action against the estate. They could only recover against the property devised or bequeathed by being subrogated to the rights which the executors could themselves enforce against the estate, and while such executors would, if they had otherwise properly disbursed all the personal estate, be entitled to proceed against specific legacies and devised land to have them marshalled, and themselves reimbursed, yet they must account for all assets realized and for all devastavits, and can only recover as for an original deficiency of assets and not for a deficiency caused by their want of diligence and prudence in the administration. *Maybury v. Grady*, 147.

## TENANT IN COMMON.

1. *Tenant in common ; has lien on land for excess of payment of purchase-money above his share.*—Where two purchasers of land take a conveyance in their joint names, thereby becoming tenants in common, by force of the statute (Code, § 2191), and jointly execute a mortgage on the lands, to indemnify their surety on the purchase-money note ; if one pays more than his proportion of the debt, he has an equitable lien, for the excess, on the interest of his co-tenant in the land. *Newbold v. Smart*, 326.
2. *Same ; not liable to each other, for use and occupation.*—Tenants in common are seized *per my et per tout*, and each has an equal right to occupy the premises ; and unless the one in actual possession denies the other the right to enter, or agrees to pay rent, nothing can be claimed for such occupation. *Ib.* 226.
3. *Same ; unequal occupation by one, simple contract debt, creating no lien.*—If one tenant in common owes another for unequal use and occupation of the common property, it is a simple contract debt, and creates no lien on the land. *Ib.* 326.



## TENDER.

1. *Tender, or agreement to waive interest, affirmative matter.*—A tender is an affirmative plea, both at law and in equity, and the burthen of proving it rests on the party pleading it, and the making of an agreement to absolve the debtor from the future payment of interest, is affirmative matter, and must be proven by the party relying on it. *Park et al. v. Wiley, 310.*
4. *Interest; how vendee absolved from payment of, vendor being unable to make title.*—If the vendee of lands offers to pay the purchase-money, at the time appointed, and the vendor is unable to make titles, and another day is appointed for that purpose, the vendee, to relieve himself from payment of interest, must pay, or tender the money on that day. *Ib. 310.*
5. *Same; same.*—If, in such a case, the vendor declines to receive the purchase-money because he is not able to make titles, the vendee will not be compelled to pay interest if the tender is kept open. *Ib. 310.*
6. *Tender; how kept open.*—When a tender is relied on, the party making it must keep the money (though not the identical coin or notes, but money of a like kind) safely, so that he may produce it when required, and in this way the tender is kept open for the acceptance of the party whenever he shows a willingness to accept it. *Ib. 310.*
7. *Same; when insufficient.*—When the evidence shows that the party making the tender borrowed the money to be used for that purpose, and immediately returned it to the lender, such a tender is insufficient, and will not absolve the party from the payment of interest. *Ib. 310.*
8. *Same; money must be paid into court to support plea of.*—A plea of tender cannot be supported, unless accompanied by the payment of money into court. *Ib. 310.*

## TRESPASS.

1. *Trespass or case; when the proper remedy.*—Trespass lies to recover damage for an injury which is the direct and primary, or inevitable result of gross or reckless carelessness; but when the injury, though proximate, is secondary or consequential, and is not the necessary result of the act of negligence, an action on the case is the remedy. *Bay Shore Railroad Co. v. Harris, pro ami, 6.*

## TRIAL OF THE RIGHT OF PROPERTY.

1. *Trial of the right of property; evidence as to the character of defendant's possession admissible.*—On the trial of the right of property between attaching creditors and a claimant, the creditors must prove that the property in controversy belonged to the defendant in attachment, at the time of the levy, and, for this purpose, they may trace the title from the original owner to the defendant, and may show the character of the actual possession to disprove the authority of one actually in possession to convey or assign the property to the claimant, and, in such a case, any evidence as to the authority of the person in actual possession to convey the property, or as to the consideration of the conveyance, and its amount, is admissible. *Elliott v. Stocks & Bro. 290.*
2. *Bona fides of the debt; to be proved by the claimant.*—If the property is held by the claimant, as a trustee for creditors, under a deed, it is also incumbent on him to show the existence and *bona fides* of the secured debts. *Ib. 290.*

## TROVER.

1. *Trover; fixtures annexed to the realty not recoverable in.*—Trover lies only for the conversion of personal property and can not be main-

TROVER—*Continued.*

- tained, at least between vendor and vendee, to recover fixtures which form part of the freehold. *Threat, Adm'r, v. Stamps*, 96.
2. *Same; what necessary to sustain action of.*—To sustain an action of trover the defendant must have unlawfully assumed dominion over the property in defiance or exclusion of the plaintiff's right, or withheld possession from him under claim of title inconsistent with the plaintiff's. *Ib.* 96.
  3. *Conversion; what necessary to constitute.*—A vendee of land whose tenant annexed "rails and bricks," which were on the land at the time of the sale, to the realty, is not guilty of a conversion unless he directed, induced, or ratified the act of his tenant in the exercise of an unauthorized dominion over the property. *Ib.* 96.
  4. *Trover; when no more costs than damages recoverable in.*—When the damages recovered in an action of trover do not exceed twenty dollars, it is error to render judgment for more costs than damages, unless the presiding judge certifies that greater damages should have been awarded; and it will not be presumed on error, in the absence of an express recital in the record to that effect, that the certificate was made. *Tecumseh Iron Co. v. Mangum*, 227.
  5. *Same; what necessary to maintain, and when mortgagee cannot maintain.*—The plaintiff, to maintain trover, must have at the time of suit brought, either the absolute or a qualified property in the chattels alleged to have been converted, and the right to immediate possession; but a mortgagee has not this right, when, by the mortgage, he is only authorized to take possession of the property after default, or the law day of the mortgage. *Elmore v. Simon & Bro.* 526.
  6. *Proper action, when goods or choses in action are, by a wrong-doer, subsequent to his tort, converted into money.*—When goods or choses in action are converted by a wrong-doer, into money, subsequent to the tort, giving the cause of action, the owner may waive the tort and recover in assumpsit the money received. *Miller, Adm'r, v. King*, 575.
  7. *Same; when not converted into money.*—Trover lies to compel a delivery of a note improperly obtained, if on demand delivery is refused; but in this case, not having used the note as money, having converted it simply, there is no ground on which the law can raise a promise to pay money for the conversion. *Ib.* 575.

## TRUSTS.

1. *Trust funds; when way be followed by cestuis que trustent.*—As long as trust funds, or the proceeds of trust property, can be satisfactorily traced and identified, the *cestuis que trustent*, if proper parties complainant, and entitled to relief, may follow them into the hands of third persons, although such person may have taken the title to the property purchased with the trust fund in his own name, or in the name of any other person, with notice of the facts, but the evidence in this case, as held by the Chancellor, fails to trace the trust funds into the property sought to be charged. *Parker et al. v. Jones' Adm'r et al.* 234.
2. *Express trust; statute of limitations does not run against.*—The statute of limitations does not begin to run against an express and continuing trust, until the trustee disavows and repudiates the trust, and this disavowal is brought to the knowledge of the *cestui que trust.* *Hastie & Silver v. Aiken*, 313.
3. *Cestuis que trustent; can not set up statute of limitations against each other.*—*Cestuis que trustent* can not set up the statute of limitations against each other, unless the trustee himself could make this defense against the *cestui que trust.* *Ib.* 313.

## TRUSTS—Continued.

4. *Same; evidence as to shares of, in trust fund.*—On a bill filed by a *cestui que trust*, against another *cestui que trust*, and the trustee, who holds funds belonging to them as late partners, for a settlement of the trust, any evidence, such as the state of the partnership accounts, showing the relative proportion due to the claimants out of the fund, is admissible. *Ib.* 313.
5. *Trustee and cestui que trust; evidence as to transactions between.*—Where parties stand to each other in confidential relations the contract does not of itself import consent. The burthen of proving the transaction fair and just, and the consent of him who sustains the detriment, and is subject to the influence, is upon the party who takes the benefit, and in whom the trust was reposed. *Holt v. Agnew*, 360.

## USES, STATUTE OF.

1. *Statute of uses; estates under may commence in futuro.*—In conveyances deriving their operation under the statute of uses, freehold estates may be made to commence in futuro; a fee may be limited on a fee, or an estate may be limited to take effect in abridgment or derogation of a preceding estate. *Brewton, Adm'r*, v. *Watson*, 121.

## VENDOR AND PURCHASER.

1. *Vendor has lien on lands.*—In the absence of an agreement, express or implied, to the contrary, the vendor of lands has a lien on them for the unpaid purchase-money which will prevail against a sub-purchaser with notice. *Craft v. Russell*, 9.
2. *Bona fide purchaser; what necessary to sustain defense as.*—When a defendant sets up the defense of a *bona fide* purchaser for value without notice in answer to a bill, to enforce a vendor's lien on land, he must aver clearly, distinctly and without equivocation—1. That he is the purchaser of the legal title. 2. That he purchased it in good faith. 3. That he parted with value by paying money or other valuable thing, assuming a liability, or incurring an injury. 4. That he had no notice of complainant's equity, and knew no fact calculated to put him on enquiry, either at the time of his purchase, or at or before the time he parted with the consideration. *Ib.* 9.
3. *Creditor taking conveyance, purchaser for value.*—When a creditor takes an absolute conveyance in payment of an antecedent debt he is a purchaser for value. *Ib.* 9.
4. *Purchaser protected as to payments made before notice.*—A purchaser of lands is entitled to protection *pro tanto*, to the extent of payments made by him before notice of the vendor's equity. *Ib.* 9.
5. *Purchase-money; when evidence of payment is admissible in ejectment by vendor against his vendee.*—In ejectment by the vendor, or his heirs, against his vendee, or those claiming under him, who hold possession under an executory contract of sale, evidence of the payment of the purchase-money is irrelevant, unless the vendee, or those claiming under him, have been in continuous possession of the lands for the period prescribed by the statute of limitations (ten years), as a bar to the action, after such payment. *Potts v. Coleman*, 217.
6. *Vendee paying debts of vendor's estate in depreciated currency entitled to credit.*—When, on a bill filed to enjoin an action of ejectment by the heirs of a vendor against a sub-vendee who holds under an executory contract, it appears that such vendee had used depreciated currency collected by him as agent of the administrators of the vendor's estate, in paying the debts of such estate, he will



VENDOR AND PURCHASER—*Continued.*

- be credited with such payments, and has an equity to redeem on payment of the purchase-money. *Ferguson et al. v. Morris*, 289.
7. *Vendee of land under parol contract; when cannot resist action for purchase-money.*—When the vendee of lands, or of an interest therein under a parol contract, takes possession under it, and his vendor is able and willing to protect him in the quiet enjoyment, he cannot successfully resist an action for the purchase-money. *Houston et al. v. Hilton et al.* 374.
  8. *Vendor's lien; may be enforced, although remedy on purchase-money note barred.*—A vendor of land, whether he retains or has parted with the legal title, may enforce his equitable lien for the unpaid purchase-money, although an action on the note or debt is barred by the statutes of limitation. *Ware v. Curry*, 275.
  9. *Same; how far vendee is protected on bill to enforce.*—When the vendee, in good faith, and without notice of the vendor's lien, has entered into possession of the land, and made valuable improvements thereon, he will be allowed compensation for them, and for partial payment made before notice, and the land will be charged with the lien for the balance of the purchase-money, after deducting such payments, and the value of such improvements. *Ib.* 275.
  10. *Same; this rule applied to facts of this case.*—A corporation, having purchased land in good faith, and entered into possession, without notice of the vendor's lien for unpaid purchase-money, and having agreed to pay for it in the shares of its capital stock, will be allowed compensation for valuable improvements, although it has not delivered the stock nor received a deed, but will be compelled to answer to the vendor, for so much of the stock as will correspond to the extent of his lien on the land. *Ib.* 275.
  11. *Vendor's lien; when purchaser can not resist, on account of defect in title.*—A purchaser of land under an executory contract, having expressly stipulated for a postponement of payment of the purchase-money until the termination of a pending suit involving his vendor's title, and for a rescission of the contract "if said litigation terminate unfavorably to the interest of R." (vendor), "so that he can not make good and valid titles to said lot;" and having received possession under the contract, and still retaining it, can not resist a bill to enforce payment of the purchase-money, on account of the defect in the vendor's title, or his inability to comply with the terms of the contract, when it appears that the suit was decided in favor of his vendor, on the ground that the adverse party, having been adjudicated a bankrupt, could not assert any right under the contract alleged by him, and the assignee in bankruptcy has become barred by the lapse of time. *Richards v. Holmes*, 577.

WILL.

1. *Will; better practice, when, after application for letters, will propounded.*—When, on an application for the grant of letters of administration, it appears that a paper has been propounded for probate as the last will of the deceased, it is the better practice to appoint a special administrator to preserve the assets, until the issue of *devisavit vel non* is determined. *Jordan et al. v. Thompson*, 469.
2. *"My estate;" meaning of these words in the will construed in this case.* Where testator gave one-half of his personal property to his wife, the remaining half of his personal property and all his real property to his executors, to be held by them in trust, to pay to his wife annually one-third of the net income and profits of the realty, if she accepted it in lieu of dower, and to take and hold all the

WILL—*Continued.*

rest of the property of every kind and nature, except the personal property given to his wife, and certain contingent legacies out of a litigated claim, to manage and control for the benefit of his daughter until she reached the age of twenty-one years, when all of said property should be delivered to her except the portion given to his wife, and said contingent legacies, including all that remained of the contingent fund arising from said litigated claim; the executors retaining compensation therefrom, and further authorized the executors to appropriate money from "the estate" for the support and education of his daughter, and in a subsequent clause in the will directed that his executors might at their discretion expend money out of "my estate" to pay his funeral expenses, &c.; the words "my estate" refer to that portion of his property given to his daughter, and the executors might, in their discretion, defray the funeral expenses out of the income of the real estate, and the residue of the litigated claim which were given to the daughter. *Maybury v. Grady, 147.*





